

# OFFICE COPY

## TRANSCRIPT OF RECORD

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Supreme Court of the United States

OCTOBER TERM, ~~1959~~ 1960

No. ~~689~~ 34

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TIMES FILM CORPORATION, PETITIONER,

vs.

CITY OF CHICAGO, ET AL.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

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PETITION FOR CERTIORARI FILED FEBRUARY 10, 1960  
CERTIORARI GRANTED MARCH 21, 1960

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

No. 12717

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**TIMES FILM CORPORATION, a New York corporation,  
Plaintiff-Appellant,**

**vs.**

**THE CITY OF CHICAGO, a municipal corporation, RICHARD  
J. DALEY, and TIMOTHY J. O'CONNOR, Defendants-  
Appellees.**

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**Appeal from the United States District Court for the  
Northern District of Illinois, Eastern Division.**

**Honorable William J. Campbell, Trial Judge.**

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**Appendix for Plaintiff-Appellant—Filed August 17, 1959**

[File endorsement omitted]



## **INDEX**

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Prefix to Record.....	1
Placita .....	3
Complaint .....	5
Ex. A—Municipal Code of Chicago.....	9
Summons .....	13
Answer .....	15
Motion of Plaintiff for judgment.....	18
Affidavit of Abner J. Mikva.....	19
Motion of Defendants for judgment.....	23
Order denying motions.....	24
Stipulation of Facts.....	25
Memorandum and Order.....	27
Notice of Appeal.....	30
Notice of Appellees.....	33
Stipulation re: Record.....	34
Clerk's Certificate .....	35

	Original	Print
Proceedings in the U.S.C.A. for the Seventh Circuit	37	37
Opinion, Schnackenberg, J. ....	37	37
Judgment .....	43	42
Clerk's certificate (omitted in printing) .....	44	43
Order allowing certiorari .....	45	43

**APPENDIX.**

1. **IN THE UNITED STATES DISTRICT COURT,  
Northern District of Illinois,  
Eastern Division.**

**Times Film Corporation, a New  
York corporation,**

*Plaintiff,*

*vs.*

**The City of Chicago, a municipal  
corporation, Richard J. Daley,  
and Timothy J. O'Connor,**

*Defendants.*

Civil Action  
No. 58 C 968

Honorable  
William J. Campbell

**PREFIX TO RECORD PURSUANT TO RULE 12(c)  
OF THE UNITED STATES COURT OF APPEALS,  
SEVENTH CIRCUIT.**

1. This suit was commenced on May 29, 1958.
2. The names of the parties to this suit are Times Film Corporation, a New York corporation, plaintiff, and City of Chicago, a municipal corporation, Richard J. Daley and Timothy J. O'Connor, defendants.
3. The pleadings were filed as follows:
  - (a) May 29, 1958: Complaint and Summons.
  - (b) June 23, 1958: Answer of defendants.
  - (c) November 12, 1958: Plaintiff's Motion for Summary Judgment with Affidavit attached thereto.
  - (d) November 21, 1958: Defendants' Motion for Summary Judgment with Affidavit and Memorandum in opposition to Plaintiff's Motion for Summary Judgment attached thereto.

*Prefix to Record.*

(e) November 28, 1958: Plaintiff's brief in support of Motion for Summary Judgment and in opposition to Defendants' Motion for Summary Judgment.

(f) December 4, 1958: Defendants' brief in support of Motion for Summary Judgment and in opposition to Plaintiff's Motion for Summary Judgment.

(g) December 11, 1958: Plaintiff's reply brief in support of Motion for Summary Judgment and in opposition to Defendants' Motion for Summary Judgment.

(h) March 6, 1958: Stipulation of Facts.

4. Defendants were not arrested nor was bail taken or property attached.

5. On February 18, 1959, a pre-trial conference was held whereby the respective parties agreed that the cause would be tried on a stipulation of facts.

6. On trial of this cause on the submitted stipulation of facts the Court found against the plaintiff and in favor of defendants.

7. On May 29, 1959, a final order was entered by the Court dismissing this cause and entering judgment in favor of defendants at plaintiff's costs.

8. On June 26, 1959, an appeal was taken by filing a Notice of Appeal and Cost Bond on Appeal by plaintiff.

Times Film Corporation, a New  
York corporation,

*Plaintiff,*

By Abner J. Mikva,

231 S. LaSalle, Chicago 4,

An 3-3700,

*Attorney for Plaintiff.*

3 Pleas had at a regular term of the United States District Court for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of May, being the 4th day thereof, in the Year of Our Lord One Thousand Nine Hundred Fifty-Nine and of the Independence of the United States of America, the 183rd Year.

Present:

Honorable Gunnar H. Nordbye, District Judge.

Honorable William J. Campbell, Chief District Judge.

Honorable Philip L. Sullivan, District Judge.

Honorable Michael L. Igoe, District Judge.

Honorable Walter J. LaBuy, District Judge.

Honorable J. Sam Perry, District Judge.

Honorable Julius J. Hoffman, District Judge.

Honorable Julius H. Miner, District Judge.

Honorable Edwin A. Robson, District Judge.

Roy H. Johnson, Clerk.

William W. Kipp, Sr., Marshal.

Friday, May 29, 1959.

Court Met Pursuant to Adjournment.

Present: Honorable William J. Campbell, Trial Judge.

UNITED STATES DISTRICT COURT.  
(Caption—58-C-968)

COMPLAINT.

Now comes Times Film Corporation, plaintiff herein, by its attorneys, Felix J. Bilgrey and Abner J. Mikva, and complain of the defendants, and allege:

Count I.

1. The ground upon which the jurisdiction of the court depends is diversity of citizenship between the parties hereto. The amount in controversy herein exceeds Three Thousand Dollars (\$3,000.00) exclusive of interest and costs. Plaintiff is a corporation incorporated under the laws of the State of New York with its principal office and place of business in the City of New York, State of New York, and is a citizen of the State of New York. Defendant City of Chicago, is a municipal corporation duly organized and existing under the laws of the State of Illinois and is a citizen of the State of Illinois. Defendant  
5 Richard J. Daley is the duly elected and acting mayor of the City of Chicago and is a citizen of the State of Illinois. Defendant Timothy J. O'Connor is the duly appointed and acting commissioner of police of the City of Chicago and is a citizen of the State of Illinois. This action arises under the first and fourteenth Amendments to the Constitution of the United States as hereinafter more fully appears.

2. Plaintiff has the exclusive right to distribute, to license for public exhibition and to exhibit in the City of Chicago the motion picture film entitled "Don Juan".

3. Pursuant to the provisions of a certain municipal ordinance enacted by the City of Chicago, being Sections

155-1 to 155-7 of the Municipal Code of the City of Chicago, a copy of which ordinance is attached hereto, marked "Exhibit A" and made a part hereof, plaintiff applied to defendant O'Connor for a permit to exhibit the motion picture film "Don Juan". Defendant O'Connor on December 17, 1957, notified plaintiff that he would not issue such a permit on the ground that such a permit shall be granted only after the film for which said permit has been requested has been produced at the Office of the Commissioner of Police, for examination. Pursuant to the municipal ordinance referred to above, plaintiff hereupon appealed said decision of defendant O'Connor to the defendant Daley on December 23d, 1957. On December 27th, 1957, defendant Daley denied the appeal and refused to issue a permit for the exhibition of "Don Juan" in the City of Chicago.

6 4. As a result of the foregoing actions of the defendants in denying plaintiff a permit to exhibit said film and as a result of the requirements of the municipal ordinance above referred to that a permit must be obtained prior to the exhibition of any motion picture film in the City of Chicago, plaintiff is forbidden and prohibited from exhibiting said motion picture film under penalty of arrest and criminal prosecution and the plaintiff has been directly damaged by not being permitted to exhibit said motion picture film.

5. Defendants' actions in denying plaintiff the requested permit are an infringement and denial to plaintiff and its constitutional rights to freedom of speech and of the press and to engage in lawful business activities in the City of Chicago.

6. Defendants' action in demanding submission of the motion picture film "Don Juan" for censorship prior to the issuance of a permit constitutes a prior restraint in violation of the 1st and 14th Amendments to the Constitution of the United States.

*Complaint.*

## Count II.

Plaintiff for a second cause of action avers:

1. Plaintiff repeats and realleges Paragraphs 1, 2, 3, and 4 of Count I of this Complaint as if they were set forth in full therein.

2. Said municipal ordinance violates on its face the 1st and 14th Amendments to the Constitution of the United States and unlawfully abridges the rights protected therein.

7 Wherefore, plaintiff prays:

(a) That the court issue an order directed to defendants City of Chicago, Richard J. Daley, Mayor of said City of Chicago, and Timothy J. O'Connor, Police Commissioner of said City of Chicago, commanding the defendants to forthwith issue to plaintiff the permit required by the aforesaid municipal ordinance.

(b) That the court issue an order restraining defendants City of Chicago, Richard J. Daley, as Mayor of said City of Chicago, and Timothy J. O'Connor, as Police Commissioner of said City of Chicago, individually and as acting officers of the City of Chicago, and all police officers, agents, servants and employees acting for and on behalf of the City of Chicago from preventing, hindering or otherwise interfering with the plaintiff, its officers or agents in the exhibition of the film "Don Juan" in the City of Chicago, Illinois.

(c) That the court provides such other and further relief as justice shall require.

Times Film Corporation, a  
New York corporation.

By Felix J. Bilgrey,  
*As Attorney,*  
and

By Abner J. Mikva,  
*As Attorney,*

By Jean Goldwurm,  
*As its President.*



*Complaint.*

7

8 State of New York, }  
County of New York. } ss.

Jean Goldwurm, being first duly sworn on oath, deposes and says that he is the President of Times Film Corporation, the plaintiff in the above action, and that he has read the above and foregoing complaint by him subscribed, that he knows the contents thereof and that the same is true in substance and fact.

Jean Goldwurm.

Subscribed and Sworn to before me this 26th day of May, 1958.

(Seal)

Andrew J. Sitzman,  
*Notary Public, State of N. Y.*  
#41-9030850.  
Qualified in Queens County,  
Certificate filed with New York  
County Clerk.

Term Expires March 30, 1960.



State of New York, }  
County of New York. } ss.

I, James McGurrin, County Clerk and Clerk of the Supreme Court, New York County, a Court of Record having by law a seal, Do Hereby Certify that Andrew J. Sitzman whose name is subscribed to the annexed affidavit, deposition, certificate of acknowledgment or proof, was at the time of taking the same a Notary Public in and for the State of New York, duly commissioned and sworn and qualified to act as such throughout the State of New York; that pursuant to law a commission, or a certificate of his official character, and his autograph signature, have been filed in my office; that as such Notary Public he was duly authorized by the laws of the State of New York to administer oaths and affirmations, to receive and certify the acknowledgment or proof of deeds, mortgages, powers of attorney and other written instruments for lands, tenements and hereditaments to be read in evidence or recorded in this State, to protest notes and to take and certify affidavits and depositions; and that I am well acquainted with the handwriting of such Notary Public, or have compared the signature on the annexed instrument with his autograph signature deposited in my office, and believe that the signature is genuine.

In Witness Whereof, I have hereunto set my hand and affixed my official seal this 26 day of May, 1958.

(Seal) James McGurrin,  
County Clerk and Clerk of the Supreme  
Court, New York County.

Fee Paid 50¢.

## Exhibit A.

155-1. It shall be unlawful for any person to show or exhibit in a public place, or in a place where the public is admitted, anywhere in the city any picture or series of pictures of the classes or kinds commonly shown in mutoscopes, kinetoscopes, or cinematographs, and such pictures or series of pictures as are commonly shown or exhibited in so-called penny arcades, and in all other automatic or motion picture devices, whether an admission fee is charged or not, without first having secured a permit therefor from the commissioner of police.

It shall be unlawful for any person to lease or transfer, or otherwise put into circulation, any motion picture plates, films, rolls, or other like articles or apparatus, from which a series of pictures for public exhibition can be produced, to any exhibitor of motion pictures, for the purpose of exhibition within the city, without first having secured a permit therefor from the commissioner of police.

The permit herein required shall be obtained for each and every picture or series of pictures exhibited and is in addition to any license or other imposition required by law or other provision of this code.

Any person exhibiting any picture or series of pictures without a permit having been obtained therefor shall be fined not less than fifty dollars nor more than one hundred dollars for each offense. A separate and distinct offense shall be regarded as having been committed for each day's exhibition of each picture or series of pictures without a permit. [Amend. Coun. J. 12-21-39, p. 1396.]

155-2. Before any such permit is granted, an application in writing shall be made therefor, and the plates, films, rolls, or other like apparatus by or from which such picture or series of pictures are shown or produced, or the

picture or series of pictures itself as shown or exhibited, shall be shown to the commissioner of police, who shall inspect such plates, films, rolls, or apparatus, or such picture or series of pictures, or cause them to be inspected, and within three days after such inspection he shall either grant or deny the permit. In case a permit is granted, it shall be in writing and in such form as the commissioner of police may prescribe.

155-3. The fee for the original permit in each case shall be three dollars for each one thousand lineal feet of film or fraction thereof, and for each duplicate or print thereof an additional fee of one dollar for each one thousand lineal feet of film or fraction thereof, which fee shall be paid to the city collector before any permit is issued.

155-4. Such permit shall be granted only after the motion picture film for which said permit is requested has been produced at the office of the commissioner of police for examination or censorship.

If a picture or series of pictures, for the showing or exhibition of which an application for a permit is made, is immoral or obscene, or portrays depravity, criminality, or lack of virtue of a class of citizens of any race, color, creed, or religion and exposes them to contempt, derision, or obloquy, or tends to produce a breach of the peace or riots, or purports to represent any hanging, lynching, or burning of a human being, it shall be the duty of the commissioner of police to refuse such permit; otherwise it shall be his duty to grant such permit.

In case the commissioner of police shall refuse to grant a permit as hereinbefore provided, the applicant for the same may appeal to the mayor. Such appeal shall be presented in the same manner as the original application to the commissioner of police. The action of the mayor on any application for a permit shall be final.

155-5. In all cases where a permit for the exhibition of a picture or series of pictures has been refused under the provisions of the preceding section because the same tends towards creating a harmful impression on the minds of children, where such tendency as to the minds of adults would not exist if exhibited only to persons of mature age, the commissioner of police may grant a special permit limiting the exhibition of such picture or series of pictures to persons over the age of twenty-one years; provided, such picture or pictures are not of such character as to tend to create contempt or hatred for any class of law abiding citizens.

When such special permit has been issued, it shall be unlawful for any person exhibiting said picture to allow any persons under the age of twenty-one years to enter the place where same is being exhibited or to remain in said place while any part of said picture or series of pictures is being shown.

Any person violating any of the provisions of this section shall be fined not less than ten dollars nor more than twenty-five dollars for each offense, and the admission of each person under twenty-one years of age, or permission to remain of such person under twenty-one years of age, shall constitute a distinct and separate offense.

155-6. The written permit provided for in this chapter shall be posted at or near the entrance of the theater, hall, room, or place where any permitted picture or series of pictures is being exhibited, at such a place and in such a position that it may easily be read by any person entering such theater, hall, room, or place at any time when any such permitted picture or series of pictures is being exhibited whether in the day time or in the night time.

155-7. When a permit to show a picture or series of pictures is once granted to an exhibitor, the picture or series of pictures may be shown by any other exhibitor;

provided, that the written permit is actually delivered to such other exhibitor and that a written notice of the transfer or lease to such other exhibitor is first duly mailed by the transferee or lessee to the commissioner of police. ~~Any number of transfers or leases of the same picture or series of pictures may be made, provided always that the permit is actually delivered to the transferee or lessee and that such written notice be first mailed to the commissioner of police.~~

Said written notice shall contain the name and a brief description of the picture or series of pictures, the number of the permit, and the location of the building or place where the transferee or lessee proposes to exhibit such picture or series of pictures. The exhibition by any transferee or lessee of any permitted picture or series of pictures without first mailing such notice shall be considered a violation of this chapter, and a separate offense shall be regarded as having been committed for each day's exhibition by a transferee or lessee of each picture or series of pictures without the mailing of such notice.

In case a permit shall be refused for any such motion picture plates, films, rolls, or other like articles or apparatus from which a series of pictures for public exhibition can be produced, it shall be unlawful for any person to lease or transfer the same to any exhibitor of motion pictures or otherwise put the same into circulation for purposes of exhibition within the city.

11

UNITED STATES DISTRICT COURT.

• • (Caption—58-C-968) • •

SUMMONS.

To the above named Defendants:

You are hereby summoned and required to serve upon Felix J. Bilgrey and Abner J. Mikva, plaintiff's attorneys, whose address is 231 South La Salle Street, Chicago 2, Illinois, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

(Seal of Court)

Roy H. Johnson,

*Clerk of Court,*

Marie Knudsen,

*Deputy Clerk.*

Date: May 29, 1958.

12

Return on Service of Writ.

I hereby certify and return, that on the ..... day of ....., 19 .., I received this summons and served it together with the complaint herein as follows: Served this writ together with copy of complaint, on the within named City of Chicago, a Municipal Corporation, by leaving copies thereof for ..... at ..... usual place of business, 121 No. La Salle St., Chicago, Illinois, with M. Brown, Legal Department, this 2nd day of June, A. D. 1958 at the same time informing her of the contents thereof.

Served this writ together with copy of complaint, on the within named Richard J. Daley, Mayor of the City of

*Summons.*

Chicago, by leaving copies thereof for him at his usual place of business, 121 No. La Salle St., Chicago, Illinois, with M. Brown, Legal Department, this 2nd day of June, A. D. 1958 at the same time informing her of the contents thereof.

Served this writ together with copy of complaint, on the within named Timothy J. O'Connor, Commissioner of Police, by leaving copies thereof for him at his usual place of business, 121 North La Salle St., Chicago, Illinois, with M. Brown, Legal Department, this 2nd day of June, A. D. 1958, at the same time informing her of the contents thereof.

W. W. Kipp, Sr.,

*United States Marshal,*

By Wm. Raff,

*Deputy United States Marshal.*

Marshal's Fees		
Travel	2	\$0.20
Service	3	6.00
		<hr/>
		\$6.20

(Stamp) Department of Law, City of Chicago, Date  
Rec'd 6/2/58 Time 3:05 P.M. John C. Melaniphy, Corpo-  
ration Counsel, by M. Brown, Records Section.



13. IN THE UNITED STATES DISTRICT COURT.  
(Caption—58-C-968)

**DEFENDANTS' ANSWER TO COMPLAINT.**

Now comes the defendants, City of Chicago, Richard J. Daley and Timothy J. O'Connor and for answer to the Plaintiff's Complaint, say that:

1. As to paragraph 1 of Count I of the Plaintiff's Complaint, these defendants admit the allegations thereof.

2. As to paragraph 2 of Count I of the Plaintiff's Complaint, these defendants have no knowledge or information sufficient to form a belief as to the allegations of said paragraph 2 and, they therefore deny the allegations thereof.

3. Further answering paragraph 3 of Count I of the Plaintiff's Complaint, these defendants admit the allegations thereof.

4. As to paragraph 4 of Count I of the Plaintiff's Complaint, these defendants admit the allegations thereof.

14 5. As to paragraph 5 of Count I of the Plaintiff's Complaint, these defendants deny that the constitutional rights of the plaintiff to freedom of speech and of the press and to engage in lawful business activities in the City of Chicago has been denied unlawfully by the defendants herein.

6. As to paragraph 6 of Count I of the Plaintiff's Complaint, these defendants deny that their action in demanding submission of the motion picture film "Don Juan" for censorship prior to the issuance of a permit constitutes a prior restraint in violation of the 1st and 14th Amendments to the Constitution of the United States.

1. As to Count II of the Plaintiff's Complaint, these defendants repeat and reallege their answers to para-



graphs 1 to 4 inclusive of Count I of the Plaintiff's Complaint as their answers to said paragraphs adopted by the plaintiff in paragraph 1 of Count II of the Plaintiff's Complaint.

2. As to paragraph 2 of Count II of the Plaintiff's Complaint, these defendants deny that the municipal ordinance therein referred to violates on its face the 1st and 14th Amendments to the Constitution of the United States and unlawfully abridges the rights protected thereby.

Further answering the Plaintiff's Complaint, these defendants deny that the plaintiff is entitled to an order demanding the defendants to forthwith issue to the plaintiff the permit required by the ordinance of the City of Chicago therein referred to in paragraph (a).

These defendants further deny that the plaintiff is entitled to a restraining order prayed in paragraph (b) 15 of the Plaintiff's Complaint.

These defendants further answering the plaintiff's prayer for relief contained in paragraph (c) of its Complaint, deny that they are entitled to any relief under the allegations of the said Complaint.

City of Chicago, a municipal corporation,  
Richard J. Daley and Timothy  
J. O'Connor,

*Defendants.*

John C. Melaniphy,

*Corporation Counsel of the City of  
Chicago,*

By Edward R. Hartigan,

*Assistant Corporation Counsel,*

James P. Daley,

*Assistant Corporation Counsel,*

*Attorneys for Defendants.*

**Certificate.**

I hereby certify that I served a copy of the within Answer upon the plaintiff herein by placing a copy thereof in an envelope addressed to Mr. Abner J. Mikva, 231 S. LaSalle Street, Chicago 4, Illinois, placing the proper United States Government postage thereon and depositing the same in the United States Government mailbox located in the City Hall, Chicago, Illinois, this ..... day of June, 1958.

Edward R. Hartigan,  
*Assistant Corporation Counsel.*

*Motion for Judgment.*

17

IN THE UNITED STATES DISTRICT COURT.

• • (Caption—58-C-968) • •

## MOTION.

Now comes Times Film Corporation, plaintiff, by its attorneys, Abner J. Mikva and Felix J. Bilgrey, and moves the Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, to enter judgment for plaintiff on Counts I and II of its Complaint and to provide the injunctive and declaratory relief therein requested and to issue an order directed to defendants commanding them to issue forthwith to plaintiff the requested permit, on the ground that there is no genuine issue as to any material fact in these Counts and that plaintiff is entitled to a judgment as a matter of law; as appears from the pleadings and Exhibits on file in this action and the affidavit of Abner J. Mikva attached hereto and made a part hereof.

Times Film Corporation,

*Plaintiff,*

By Abner J. Mikva and

Felix J. Bilgrey,

*Its Attorneys,*

Abner J. Mikva,

231 South LaSalle St.,

Chicago 4, Illinois,

Andover 3-3700.

18 State of Illinois, }  
County of Cook. } ss.

**Affidavit.**

Abner J. Mikva, being first duly sworn, on oath deposes and says:

1. He is the attorney for plaintiff in the above entitled action.

2. This is an action against City of Chicago, and its Mayor Richard J. Daley and its Police Commissioner Timothy J. O'Connor, seeking injunctive and declaratory relief, requesting the Court to direct defendants to issue a permit for exhibition of a motion picture. The motion for summary judgment which this affidavit supports requests that this Court enter judgment on all the Counts of the Complaint. Deponent refers to the Complaint herein for a more particular statement of the cause of action.

3. The answer of defendants admits the following facts:

(a) That this Court has jurisdiction on the grounds of both the diversity of citizenship between the parties and since the action arises under the First and Fourteenth Amendments to the Constitution of the United States. The amount in controversy herein exceeds Three Thousand Dollars (\$3,000.00) exclusive of interest and costs.

(b) That plaintiff sought to obtain a permit for exhibition of a motion picture entitled "Don Juan" as purportedly required by Sections 155-1 to 155-7 of the Municipal Code of the City of Chicago, and that such permit was refused on the ground that plaintiff refused to submit the aforesaid motion picture for censorship by the office of the Commissioner of Police.

(c) As a result of defendants' action, plaintiff is

*Motion for Judgment.*

prohibited from exhibiting the motion picture "Don Juan" under penalty of arrest and criminal prosecution. This prohibition has resulted in monetary damage to plaintiff.

4. As to paragraph 2 of the Complaint, deponent states that he has in his possession admissible evidence to show that plaintiff has the exclusive right to distribute, to license for public exhibition and to exhibit in the City of Chicago the motion picture entitled "Don Juan."

5. The question, therefore, presented by Counts I and II are questions of law as to whether defendants' actions in denying plaintiff the requested permit are an infringement of plaintiff's constitutional rights and as to whether the ordinance in question violates the First and Fourteenth Amendments to the Constitution of the United States.

Further deponent sayeth not.

Abner J. Mikva.

Subscribed and Sworn to before me this 11th day of November, 1958.

(Seal)

Engenie Ermoyan,  
Notary Public.

20

IN THE UNITED STATES DISTRICT COURT.

• • (Caption—58-C-968) • •

NOTICE.

To: John C. Melaniphy, Corporation Counsel, City of  
Chicago, Attorney for Defendants,  
511 City Hall,  
Chicago, Illinois

Please Take Notice that on the 24th day of November, 1958, at the opening of Court on that day or as soon thereafter as counsel may be heard, I shall appear before the Honorable William J. Campbell, Judge of the U. S. District Court, Northern District of Illinois, Eastern Division, or any other judge that may be sitting in his stead, and move for entry of summary judgment herein in favor of Times Film Corporation against City of Chicago, Richard J. Daley and Timothy J. O'Connor, defendants, for the relief prayed for in Counts I and II of the Complaint, together with costs and disbursements, pursuant to Rule 56 of the Federal Rules of Civil Procedure, and in support of said motion I shall present the affidavit of Abner J. Mikva, a copy of which is attached hereto.

At which time and place you may appear if you so see fit.

Abner J. Mikva,

231 S. LaSalle St.,

Chicago 4, Illinois,

Andover 3-3700,

*Attorney for Plaintiff.*

21 State of Illinois, }  
County of Cook. } ss.

*Affidavit.*

Eugenie Ermoyan, being first duly sworn, on oath deposes and says that she served the foregoing Notice on John C. Melaniphy, Corporation Counsel, City of Chicago, attorney for defendants, by placing a copy of the foregoing Notice, together with copy of Motion and Affidavit referred to therein, in a postage prepaid, properly addressed envelope to said attorney, and placing said envelope in the U. S. mail chute at 231 S. LaSalle St., Chicago, at 5:00 p. m. November 11, 1958.

Eugenie Ermoyan.

Subscribed and Sworn to before me this 11th day of November, 1958.

Esther C. Hallgren,  
*Notary Public.*

(Seal)

22

IN THE UNITED STATES DISTRICT COURT.  
• • (Caption—58-C-968) • •

**MOTION FOR SUMMARY JUDGMENT.**

Now come the defendants, City of Chicago, a municipal corporation, Richard J. Dailey, Mayor of the City of Chicago and Timothy J. O'Connor, Commissioner of Police of said City of Chicago, and move the court to enter judgment for the said defendants, pursuant to Rule 56 of the Federal Rules of Civil Procedure, on the ground that there is no genuine issue as to any material fact as appears from the pleadings on file in this case and from the affidavit of Edward R. Hartigan, an Assistant Corporation Counsel for the City of Chicago, to whom said case has been assigned the defense of the defendants.

City of Chicago, a municipal corporation,  
Richard J. Daley and Timothy  
J. O'Connor,

*Defendants.*

John C. Melaniphy,  
*Corporation Counsel of the City of  
Chicago,*

By Edward R. Hartigan,  
*Assistant Corporation Counsel,*  
James P. Daley,  
*Assistant Corporation Counsel,*  
*Attorneys for Defendants.*



I hereby certify that I served a copy of the within Motion For Summary Judgment upon the plaintiff herein by placing a copy thereof in an envelope addressed to Messrs. Abner J. Mikva and Filex J. Bilgrey, 231 S. La Salle Street, Chicago 4, Illinois, placing the proper United States Government postage thereon and depositing the same in the United States Government mailbox located in the City Hall, Chicago, Illinois, this 21st day of November, 1958.

Edward R. Hartigan,  
*Assistant Corporation Counsel.*

IN THE UNITED STATES DISTRICT COURT.  
• • (Caption—58-C-968) • •

Tuesday, January 6, 1959.

Present: Honorable William J. Campbell, District Judge.

Upon due consideration the Court being fully advised it is

Ordered that defendants' and plaintiff's motions for summary judgment be and the same hereby are denied.

25

IN THE UNITED STATES DISTRICT COURT.

• • (Caption—58-C-968) • •

**STIPULATION OF FACTS.**

It is hereby stipulated by and between Times Film Corporation, a New York corporation, plaintiff, in the above entitled cause, by its attorney, Abner J. Mikva, and City of Chicago, a municipal, Richard J. Daley and Timothy J. O'Connor, defendants in the above entitled cause, by their attorney, John C. Melaniphy, Corporation Counsel of the City of Chicago, that the following fact allegations contained in the Complaint are true.

1. That the U. S. District Court, has jurisdiction on the grounds of both the diversity of citizenship between the parties and because the action arises out of the First and Fourteenth Amendments to the Constitution of the United States. The amount in controversy exceeds the sum of \$10,000.00 exclusive of interest and costs.

2. That pursuant to the provisions of Sections 155-1 to 155-7 of the Municipal Code of Chicago, plaintiff applied to defendant O'Connor for a permit to exhibit the 26 motion picture "Don Juan"; that said defendant notified plaintiff that he would not issue such a permit because such permit could only be granted after the film had been produced at the Office of the Commissioner of Police for examination; that plaintiff refused to so submit such film, but appealed the decision of defendant O'Connor to the defendant Daley; that defendant Daley thereupon denied the appeal.

3. That because of plaintiff's refusal to produce the film at the Office of the Commissioner of Police and the consequent denial of a permit, plaintiff is prohibited from exhibiting the motion picture "Don Juan" under penalty

*Stipulations of Facts.*

of a fine of not less than \$50.00 nor more than \$100.00 for each day the picture is exhibited without a permit and the plaintiff has been directly damaged by not being permitted to exhibit said motion picture film.

4. Plaintiff has the exclusive right to distribute, to license for public exhibition and to exhibit in the City of Chicago the motion picture film entitled "Don Juan".

5. Plaintiff is still unwilling to submit the motion picture to defendants for censorship as provided in aforesaid ordinance.

6. The above Stipulation contains all the issues of fact raised by the pleadings of the parties. Plaintiff and  
27 defendants agree that the case be submitted on the basis of this Stipulation for final decision by the Court.

Times Film Corporation, a New York corporation,

*Plaintiff,*

By Abner J. Mikva,

231 S. La Salle, Chicago, AN 3-3700,

*Its Attorney,*

City of Chicago, a municipal corporation,

Richard J. Daley and Timothy J. O'Connor,

*Defendants,*

By John C. Melaniphy,

*Corporation Counsel of the City  
of Chicago,*

By Edward R. Hartigan.

28

IN THE UNITED STATES DISTRICT COURT.

• • • (Caption—58-C-968) • • •

## MEMORANDUM AND ORDER.

*CAMPBELL, District Judge.*

This action arises pursuant to the Complaint filed by Times Film Corporation against the City of Chicago, Mayor Richard J. Daley and Police Commissioner Timothy J. O'Connor, and is submitted on the basis of a stipulation of facts for final decision.

Pursuant to the provisions of Sections 155-1 to 155-7 of the Municipal Code of Chicago, plaintiff applied to defendant, O'Connor for a permit to exhibit the motion picture, "Don Juan". Defendant O'Connor notified plaintiff that he would not issue such a permit because such permit could only be granted after the film had been produced at the office of the Commissioner of Police for examination. Plaintiff refused to so submit such film, but appealed to defendant Daley who denied the appeal. Because of plaintiff's refusal to produce the film at the office of the Commissioner of Police and the consequent denial of a permit, plaintiff is prohibited from exhibiting the motion picture "Don Juan" under penalty of a fine of not less than \$50.00 nor more than \$100.00 for each day the picture is exhibited without a permit.

Plaintiff alleges that said ordinance is void on its face as a prior restraint in violation of the 1st and 14th Amendments to the Constitution of the United States, and prays for injunctive relief in order to exhibit the said film in the City of Chicago.

It is my opinion that I am without jurisdiction to hear this cause on many grounds.

First. Before I can be called upon to pronounce this Statute unconstitutional—the most “important and delicate duty of this Court which is only to be used as a “last resort”—there must exist a “justiciable controversy.” In my opinion, no such controversy exists. *Musk-rat v. U. S.*, 219 U. S. 346; *Skelly Oil Co. v. Phillips*, 339 U. S. 667, 672; *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U. S. 583, 597-598; *U. S. v. Johnson*, 319 U. S. 302; *Willing v. Chicago Auditorium*, 277 U. S. 274; *Liberty Warehouse Co. v. Grannis*, 273 U. S. 70, 74-76; *Steamship Co. v. Emigration Commissioners*, 113 U. S. 33, 39; *Oldland v. Gray*, 179 F. 2d 408; *Coffman v. Federal Laboratories*, 55 F. Supp. 501. Nor has there been presented, a “substantial” federal question. *Gully v. First National Bank*, 299 U. S. 109, 114. Nor has plaintiff suffered a direct or threatened injury. *Hague v. C. I. O.*, 307 U. S. 496, 507, 508; *Frothingham v. Mellon*, 262 U. S. 447.

Second: In essence, the Complaint is concerned with the exhibition of the film, “Don Juan” in the City of Chicago. Had plaintiff submitted said film for examination by the Commissioner of Police as the Ordinance requires, the Commissioner may have approved the film which would have, of necessity, dispelled any need for legal action. The cases are legion which hold that one who has failed to make proper application, is not at liberty to complain because of his anticipation of improper or invalid action. *Bourjois v. Chapman*, 301 U. S. 183, 188; *Dist. of Columbia v. Clawans*, 300 U. S. 608, 616; *Smith v. Cahoon*, 283 U. S. 553, 562; *Lehon v. City of Atlanta*, 242 U. S. 53, 56; *Gundling v. Chicago*, 177 U. S. 183, 186. And see *Kingsley Inter. Pic. Corp. v. City of Providence, R. I.*, 166 F. Supp. 456, 460.

Plaintiff cannot seriously contend that prior restraint of motion pictures is, per se, a violation of the 1st and 14th Amendments. *Joseph Burstyn Inc. v. Wilson*, 343 U. S. 495, 502. Plaintiff has also failed to analyse *Times Film*

*Corporation v. City of Chicago*, 355 U. S. 35 which presumptively sustains the constitutionality of the Ordinance in question in the light of *American Civil Liberties Union v. City of Chicago*, 3 Ill. 2d 334, 121 NE. 2d 585, though reversing on the "facts". It is therefore impossible to contend that the Ordinance is "void on its face". (I take into consideration *Paramount Film Distributing Corp. v. City of Chicago*, (58 C 437), which recently declared one section of the Ordinance unconstitutional).

Third: Plaintiff has not been restricted from the exhibition of the film "Don Juan" except by the statutory sanction of a fine. That such a fine would be levied against plaintiff if plaintiff exhibited said film is not only hypothetical but also "too remote and abstract an inquiry for the proper exercise of the judicial function". *Longshoremen's Union v. Boyd*, 347 U. S. 222, 224; *United Public Workers v. Mitchell*, 330 U. S. 75, 89-91; *New Jersey v. Sargent*, 269 U. S. 328. This cause falls within the self imposed restraints upon the federal courts so well expressed by Mr. Justice Brandeis in *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 345 *et seq.* Also see *United States v. Auto Workers*, 352 U. S. 567, 590, 591.

30 Fourth: Without specific allegations, plaintiff broadly contends that said Ordinance is void on its face as a prior restraint in violation of the 1st and 14th Amendments to the Constitution of the United States. This type of "scatter-shot" attack upon the constitutionality of a statute has been expressly condemned. *Staub v. City of Barley*, 355 U. S. 313, 332.

Fifth: Here, since plaintiff has not and will not suffer an immediate and irreparable harm, I am without equitable jurisdiction to grant the injunctive relief requested. *Kingsley Inter. Pic. Corp. v. City of Providence, R. I.*, *supra*. *Douglas v. City of Jeanette*, 319 U. S. 157. A federal court of equity should only interfere with the enforcement of

*Notice of Appeal.*

state laws to prevent irreparable injury which is clear and imminent. *American Federation of Labor v. Watson*, 327 U. S. 582, 593.

Judgment for defendants. Cause dismissed at plaintiff's costs.

Campbell,

*Judge.*

May 29, 1959.

31

IN THE UNITED STATES DISTRICT COURT  
For the Northern District of Illinois,  
Eastern Division.

Times Film Corporation, a New  
York Corporation,

*Plaintiff,*

*vs.*

The City of Chicago, a municipal  
corporation, Richard J. Daley  
and Timothy J. O'Connor,  
*Defendants.*

No. 58 C 968.

**NOTICE OF APPEAL.**

Notice is hereby given that the above-named plaintiff, Times Film Corporation, a New York corporation, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the final judgment entered in this cause on May 29, 1959, and from the order dismissing this cause, which order of dismissal was also entered on May 29, 1959.

Furthermore, the Clerk of this Court is hereby directed to prepare the entire record, including exhibits and the Stipulation of Facts, in this cause for transmission to the



United States Court of Appeals for the Seventh Circuit,  
pursuant to Rule 12(a) of the Rules of Practice of the  
United States Court of Appeals for the Seventh Cir-  
cuit and pursuant to Rule 75(o) of the Rules of Civil  
Procedure for the United States District Courts.

Dated: June 26, 1959.

Abner J. Mikva,  
*Attorney for Plaintiff,*  
231 South La Salle Street,  
Chicago 4, Illinois,  
Andover 3-3700.

Attorney for Defendants-Appellees,  
John C. Melaniphy,  
*Corporation Counsel,*  
City of Chicago,  
511 City Hall,  
Chicago 2, Illinois.



33. United States of America. }  
Northern District of Illinois. } ss:

• • (Caption—58-C-968) • •

**Certificate of Mailing.**

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that on June 26, 1959 in accordance with Rule 73(b) of the Federal Rules of Civil Procedure, a copy of the foregoing Notice of Appeal was mailed to:

John C. Melaniphy, Corporation Counsel,  
City of Chicago,  
511 City Hall,  
Chicago 2, Illinois.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 26th day of June, 1959.

Roy H. Johnson,  
*Clerk.*

By Gizella Butcher,  
*Deputy Clerk.*

(Seal)

34

City of Chicago  
Department of Law  
511 City Hall  
Telephone RAndolph 6-8000

June 29, 1959

Roy H. Johnson  
Clerk of the United States District Court  
202 U. S. Court House  
Chicago, Illinois

Re: Times Film Corporation vs. City of Chicago, et al., Case No. 58 C 968.

Dear Sir:

Pursuant to Rule 12(d) of the United States Court of Appeals for the Seventh Circuit, please be advised that

John C. Meianiphy  
Corporation Counsel of the  
City of Chicago  
and

Sydney R. Drebin  
Assistant Corporation Counsel  
511 City Hall  
Chicago 2, Illinois  
Randolph 6-8000, Ext. 878

are the attorneys for the defendants-appellees in the above entitled cause.

Very truly yours,

Sydney R. Drebin,

*Assistant Corporation Counsel,  
Head of Appeals and Review  
Division.*

SRD:cl

cc: Abner J. Mikva,  
Attorney for Plaintiff,  
231 S. La Salle Street,  
Chicago 4, Illinois.

34

*Stipulation re: Record.*

35

IN THE UNITED STATES DISTRICT COURT.

• • (Caption—58-C-968) • •

**STIPULATION.**

It is hereby agreed by and between the parties to the above entitled cause, by their respective attorneys, that pursuant to Rule 12(e) of the Rules of the United States Court of Appeals for the Seventh Circuit, the Clerk of the United States District Court, Northern District of Illinois, Eastern Division, is hereby directed to transmit the following original papers in this proceeding and no others:

1. Complaint, Summons and Security for Cost filed May 29, 1958.
2. Answer of defendants filed June 23, 1958.
3. Plaintiff's Motion for Summary Judgment and Affidavit attached thereto filed November 12, 1958.
4. Defendants' Motion for Summary Judgment and Affidavit attached thereto filed November 21, 1958.
5. Docket entry of January 6, 1959, as follows:  
"Defendants' and plaintiff's motions for summary judgment are denied."
- 36 6. Stipulation of Facts filed March 6, 1959.
7. Final order entering judgment for defendants at plaintiff's costs signed May 29, 1959.
8. Plaintiff's Notice of Appeal and Cost Bond on Appeal filed June 26, 1959.

Times Film Corporation, a New York corporation,

*Plaintiff,*

By Abner J. Mikva,

*Plaintiff's Attorney,*

231 S. La Salle St.,  
Chicago,  
An 3-3700,

City of Chicago, a municipal corporation, Richard J. Daley, and Timothy J. O'Connor,

*Defendants;*

By John C. Melaniphy,

*Corporation Counsel, City  
of Chicago,*

*City Hall,*

*Chicago,*

*Attorney for Defendants.*

37 United States of America, }  
Northern District of Illinois. } ss:

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that the annexed and foregoing are the original papers constituting the record on appeal in the cause entitled: Times Film Corporation, a New York corporation, Plaintiff *vs.* The City of Chicago, a Municipal corporation, Richard J. Daley, and Timothy J. O'Connor, Defendants, No. 58 C 968, as follows:

Complaint filed May 29, 1958;

Summons with Marshal's return endorsed thereon and filed June 5, 1958;

Defendant's answer to complaint filed June 23, 1958;

Motion of plaintiff filed November 12, 1958;

Motion for summary judgment by defendants, filed November 21, 1958;

Order entered January 6, 1959, denying motions of plaintiff and defendants;

Stipulation of facts filed March 6, 1959;

Memorandum and order entered May 29, 1959;

Notice of Appeal of plaintiff filed June 26, 1959;

*Clerk's Certificate.*

Certificate of mailing attached thereto;

- 38 Information pursuant to Rule 12(d) of the United States Court of Appeals, for the Seventh Circuit, filed June 30, 1959;

Stipulation pursuant to Rule 12(e) of the United States Court of Appeals, for the Seventh Circuit, filed July 9, 1959;

filed and entered among the records of the said Court in my office on the dates indicated.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 16th day of July, 1959.

Roy H. Johnson,  
*Clerk,*

By Gizella Butcher,  
*Deputy Clerk.*

(Seal)

[fol. 37]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

No. 12717 September Term, 1959

September Session, 1959

TIMES FILM CORPORATION, a New York corporation,  
Plaintiff-Appellant,

v.

THE CITY OF CHICAGO, a municipal corporation, RICHARD  
J. DALEY, its mayor, and TIMOTHY J. O'CONNOR, its  
police commissioner, Defendants-Appellees.

Appeal from the United States District Court of the  
Northern District of Illinois, Eastern Division.

OPINION—November 27, 1959

Before Hastings, Chief Judge, and Schnackenberg and  
Knoch, Circuit Judges.

SCHNACKENBERG, Circuit Judge. From a judgment for  
defendants, The City of Chicago, a municipal corporation,  
Richard J. Daley, its mayor, and Timothy J. O'Connor,  
its police commissioner, dismissing the plaintiff's cause,  
the latter has appealed.

By its complaint, plaintiff sought an order from the  
district court commanding defendants to forthwith issue  
to plaintiff the permit required by the city's ordinance,  
known as §§ 155-1 to 155-7 of the Municipal Code of the  
City of Chicago, alleging that it applied to O'Connor for  
a permit to exhibit a motion picture film entitled "Don  
Juan", but that he did not issue the permit on the ground  
[fol. 38] that such a permit shall be granted only after such  
film had been produced at his office for examination; that an

appeal to defendant Daley proved unsuccessful, and that, without a permit, plaintiff is prohibited from exhibiting said film under penalty of arrest and criminal prosecution, all in denial of plaintiff's rights under the first and fourteenth amendments to the constitution of the United States.

The defendants having answered the complaint, and the facts having been stipulated, the court entered the judgment from which the appeal was taken.

§ 155-1 of the ordinance provides:

"It shall be unlawful for any person to show or exhibit in a public place, or in a place where the public is admitted, anywhere in the city any picture . . . without first having secured a permit therefor from the commissioner of police.

"Any person exhibiting any picture or series of pictures without a permit having been obtained therefor shall be fined not less than fifty dollars nor more than one hundred dollars for each offense. . . ."

§ 155-4 of said ordinance reads:

"If a picture or series of pictures, for the showing or exhibition of which an application for a permit is made, is immoral or obscene, or portrays depravity, criminality, or lack of virtue of a class of citizens of any race, color, creed, or religion and exposes them to contempt, derision, or obloquy, or tends to produce a breach of the peace or riots, or purports to represent any hanging, lynching, or burning of a human being, it shall be the duty of the commissioner of police to refuse such permit; otherwise it shall be his duty to grant such permit.

In its complaint, plaintiff has limited its statement of the facts in an obvious attempt to so frame its case that the United States Supreme Court will be persuaded to rule upon the question of constitutionality of motion picture censorship, a course from which, according to Mr. Justice Harlan, *Kingsley Picture Corp. v. Regents of U.*



[fol. 39] of *N.Y.*, 360 U.S. 684, 708, the Court has carefully abstained. In plaintiff's paring down of the facts, however, it has reduced the case to an abstract question of law. It is fundamental that, while the courts will adjudicate controversies, they will not announce opinions where concrete issues in actual cases, are not set forth. In *United Public Workers v. Mitchell*, 330 U.S. 75, 89, the court said:

"As is well known, the federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues, 'concrete legal issues, presented in actual cases, not abstractions,' are requisite. \* \* \*"

The subject matter involved in this case is, according to the complaint, a moving picture film, which is described in no way except as "Don Juan". The nature of its contents, either generally or specifically, is not revealed by the complaint and is not alleged to have been made known to defendants. The film itself was not tendered to the district court or this court and is not in the record. No one, except those in privity with plaintiff, knows whether the film *Don Juan*, for which the protection, first of this court, and eventually of the United States Supreme Court, is sought, is a picture of (for instance) a happy Sunday School picnic, a bullfight, or any one of the following (*inter alia*): (a) an immoral or obscene act; (b) exposure of the citizens of any race, color, creed or religion to contempt, derision or obloquy by attributing to them depravity, criminality or lack of virtue; (c) acts tending to produce a breach of the peace or riots; or (d) a hanging, lynching, or burning of a human being. With the physical object constituting the subject matter of this complaint hidden from the court, we are left to guess as to what our holding is to apply. If we grant the relief prayed, we will be sanctioning the public exhibition of we know not what. It might be a portrayal of a school of crime, which, for instance, teaches the steps to be taken in successfully carrying out an assassination of a president of the United States as he leaves the White House; or shows how to arrange an uprising of subversive groups in one of our cities.



[fol. 40] Although plaintiff, evidently for strategic purposes, refuses to take a stand which will reveal the contents of the film, certain argument in its brief point strongly to the fact that the film is one subject to a charge of obscenity. Most of the cases cited by it involve that charge. Specifically, plaintiff refers to *Times Film Corp. v. City of Chicago*, 244 F.2d 432, where we considered a film charged to be obscene. The brief of counsel for the plaintiff in the case at bar quotes at great length from the report of a master in chancery in that case, only a small part of which we set forth below:

"At least it cannot be concluded that, for the purposes of limiting the basic constitutional protection to freedom of expression, arousal of sexual desires in normal persons is in the same category as danger to the nation at war, or incitements to riots and acts of violence, or to the overthrow by force of orderly government, or even with expressions which have the effects of force."

The same ordinance is involved in both that case and this. We may fairly infer that, in plaintiff's opinion, obscenity is in the same category, for present purposes, with incitement to riots.

We recognize that there may be differences of opinion as to whether a film, if it tends to produce a breach of the peace or riots, is entitled to be shown in a theater repeatedly as long as the theater manager is willing to post appearance bonds following repeated arrests for violation of the criminal sections of the ordinance, or whether such a showing of the film should await its approval by a censorship board. But those differences should be resolved by a court having possession of the full facts, none of which is more relevant than the film itself. We would not emulate the play of Hamlet without Hamlet. Without the film before the court, we are presented with a hypothetical case in which even the hypothesis is incomplete. We are being asked to adjudicate an abstract question of law, based upon an incomplete skeleton of facts. Without knowledge of the film's contents, the district court and we are not in a position to determine whether plain-

tiff has a right to exhibit its film without city censorship.

In *Longshoremen's Union v. Boyd*, 347 U.S. 222, the court said, at 224:

[fol. 41] " \* \* \* That is not a lawsuit to enforce a right; it is an endeavor to obtain a court's assurance that a statute does not govern hypothetical situations that may or may not make the challenged statute applicable. Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function. *United Public Workers v. Mitchell*, 330 U.S. 75; see *Muskraat v. United States*, 219 U.S. 346, and *Alabama State Federation of Labor v. McAduffy*, 325 U.S. 450. Since we do not have on the record before us a controversy appropriate for adjudication, the judgment of the District Court must be vacated, with directions to dismiss the complaint."

Plaintiff makes clear its contention that "the city's power is limited to punishment after the fact, just as it is in other areas of criminal law." If that contention is correct, thus barring censorship before a film is exhibited in public theaters, actual prior restraint will scarcely exist as to the exhibition of a film in theaters. While it is common knowledge that the responsible owners of newspapers and television broadcasting systems respectively exercise a wholesome, voluntary censorship over newspapers and television, no similar regulation of the exhibition of moving picture films in theaters is as effectively exercised by private industry. The arrest and prosecution of employees of theaters who exhibit films charged with obscenity, inciting to riot, and the other proscriptions mentioned in the ordinance under consideration, is at most a theoretical remedy of prevention. It would be practically ineffectual, especially in this case. Plaintiff, owner of the film, is a New York corporation, having its place of business in New York City. It does not appear that it has any headquarters in Illinois. A criminal prosecution against the operator of the projector showing the film in a theater in Chicago, or against

some other employee of the theater, would be practically doomed to failure as a means of *stopping* the showing of the film. Even if such a prosecution finally culminated in a conviction, in the meantime the damage caused by the showing of the film would have been done. A film which [fol. 42] incites a riot produces that result almost immediately after it is shown publicly. Likewise, the effect upon the prurient mind of an obscene film may result harmfully to some third person within hours after the film has been shown. These are disadvantages of the doctrine of limiting the power of the city to punishment after the fact, for which plaintiff contends.

We have briefly referred to some of the considerations which bear upon the abstract question presented by plaintiff. The film not being before the court, no hypotheses will be assumed to apply to its contents. For the reasons hereinbefore set forth, the judgment of the district court is affirmed.

Judgment Affirmed.

[fol. 43]

IN UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

No. 12717

**TIMES FILM CORPORATION, a New York corporation,  
Plaintiff-Appellant,**

**vs.**

**THE CITY OF CHICAGO, a municipal corporation, RICHARD J. DALEY, its mayor, and TIMOTHY J. O'CONNOR, its police commissioner, Defendants-Appellees.**

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Before Hon. John S. Hastings, Chief Judge, Hon. Elmer J. Schnackenberg, Circuit Judge, Hon. Win G. Knoch, Circuit Judge.

## JUDGMENT—November 27, 1959

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, with costs, in accordance with the opinion of this Court filed this day.

[fol. 44] Clerk's certificate to foregoing transcript (omitted in printing).

[fol. 45]

SUPREME COURT OF THE UNITED STATES

No. 689, October Term, 1959

TIMES FILM CORPORATION, Petitioner,

vs.

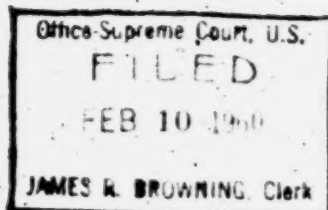
CITY OF CHICAGO et al.

## ORDER ALLOWING CERTIORARI—March 21, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY



IN FILE

Supreme Court of the United States

OCTOBER TERM, 1959

No.

~~689~~ 34

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TIMES FILM CORPORATION,

*Petitioner,*

v.

CITY OF CHICAGO, RICHARD J. DALEY and  
TIMOTHY J. O'CONNOR,

*Respondents.*

---

PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

---

FELIX J. BILGREY  
144 West 57th Street  
New York 19, New York

ABNER J. MIKVA  
231 South LaSalle Street  
Chicago 4, Illinois

*Counsel for Petitioner*

# INDEX

	PAGE
Citations to Opinions Below .....	1
Jurisdiction .....	2
Questions Presented .....	2
Statutory Provisions .....	2
Statement .....	2
Reasons for Granting the Writ .....	4
Conclusion .....	11
Appendix A—Memorandum and Order .....	1a
Appendix B—Opinion of Circuit Court .....	5a
Appendix C—List of Cases Arising Under Municipal Ordinance in Question .....	13a
Appendix D—Relevant Portions of the Municipal Code of Chicago .....	15a

## TABLE OF CASES CITED

<i>American Civil Liberties Union v. Chicago</i> , 3 Ill. 2d 334, 121 N. E. 2d 585 (1955) .....	9
<i>Burstyn v. Wilson</i> , 343 U. S. 495 (1952) ..	4, 5, 6, 7, 8
<i>Capitol Enterprises, Inc. v. City of Chicago</i> , 260 F. 2d 670 (C. A. 7, 1958) .....	10, 11
<i>Holmby Productions, Inc. v. Vaughn</i> , 350 U. S. 870 (1955) .....	7
<i>Kingsley International Pictures Corp. v. Regents of the University of the State of New York</i> , 358 U. S. 897 (1958) .....	6, 7
<i>Near v. Minnesota</i> , 283 U. S. 697 (1931) .....	5

	PAGE
<i>Terrace v. Thompson</i> , 263 U. S. 197 (1923) . . . .	10
<i>Union Pacific RR Co. v. Public Service Commis-</i> <i>sion</i> , 248 U. S. 67 (1918) . . . . .	8

#### OTHER AUTHORITIES CITED

##### Constitution of the United States:

First Amendment . . . . .	2, 4, 5, 6
Fourteenth Amendment . . . . .	2, 4, 6

Ill. Rev. Stat. 1959, Ch. 38, Section 470 . . . . .	10
---	----

Municipal Code of the City of Chicago, Chapter 155, Sections 1-7 . . . . .	2, 7
---	------

##### 28 U. S. C.:

Section 1254(1) . . . . .	2
Section 1331 . . . . .	4
Section 1332 . . . . .	4

IN THE  
**Supreme Court of the United States**

**OCTOBER TERM, 1959**

**No.**

---

**TIMES FILM CORPORATION,**

*Petitioner,*

**v.**

**CITY OF CHICAGO, RICHARD J. DALEY and  
TIMOTHY J. O'CONNOR,**

*Respondents.*

---

**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

*To the Honorable Chief Justice and Associate Justices  
of the Supreme Court of the United States:*

Comes now the Petitioner, Times Film Corporation, and prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled case on November 27, 1959.

**Citation to Opinions Below**

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, is set forth in U. S. D. C. E. D. Ill. 58-C-968 (1959).



and is attached hereto as Appendix A. The opinion of the United States Court of Appeals for the Seventh Circuit is USCA 7—12717 (1959), not yet reported, and is attached hereto as Appendix B.

### **Jurisdiction**

The judgment of the United States Court of Appeals for the Seventh Circuit was entered November 27, 1959.

The jurisdiction of this Court is evoked under 28 U. S. C. Section 1254 (1).

### **Question Presented**

Are those provisions of the Chicago licensing ordinance which provide for censorship of all motion pictures prior to their exhibition void as an unconstitutional infringement of rights guaranteed under the First and Fourteenth Amendments?

### **Statutory Provisions**

The statutory provisions involved are Sections 1 through 7 of Chapter 155 of the Municipal Code of the City of Chicago and the First and Fourteenth Amendments of the United States Constitution. They are printed in Appendix D, infra, pp. 15a-17a.

### **Statement**

This action arises pursuant to a Complaint filed by Times Film Corporation, Petitioner, against the City of Chicago, Richard J. Daley, its Mayor, and Timothy

J. O'Connor, its Police Commissioner. The facts are undisputed and a Stipulation of the Facts was entered into by Petitioner and defendants and filed with the court below (R-25).

Petitioner has the exclusive right to distribute, license for public exhibition and to publicly exhibit in the City of Chicago a motion picture entitled "Don Juan." On December 10, 1957, Petitioner applied for a license to publicly exhibit "Don Juan," submitting the license fee to defendant O'Connor with its application as required, but refusing to comply with the requirement of the ordinance which authorized the City to review the film for censorship of content. On December 17, 1957, defendant O'Connor denied Petitioner's request for a license on the ground that it had failed to submit the motion picture for censorship as required under the ordinance.

On December 23, 1957, pursuant to the provisions of the ordinance, Petitioner appealed the decision of defendant O'Connor to defendant Daley. On December 27, 1957, defendant Daley denied the appeal and refused to issue a permit without submission of the film for censorship.

On May 28, 1958, Petitioner thereupon commenced the above entitled action in the United States District Court for the Northern District of Illinois, Eastern Division, by the filing of a Complaint against the City of Chicago, its Mayor and Police Commissioner, the respondents herein. On May 29, 1959, the trial court filed its Memorandum and Order (R-27), entering judgment for the defendants and dismissing the case. Petitioner thereupon appealed the decision below to

the United States Court of Appeals for the 7th Circuit, which upheld the lower court on decision handed down November 27, 1959 (Appendix B, pp. 5a-12a).

Jurisdiction in the District Court is invoked under 28 U. S. C., Sections 1331 and 1332, in that the action arises under the Fourteenth Amendment to the Constitution of the United States and in that there is diversity of citizenship between the petitioner, a citizen of the State of New York, and respondents, all of whom are citizens of the State of Illinois. The amount in controversy exceeds \$3,000.00 exclusive of interests and costs and the case was filed prior to the statutory change in the requisite jurisdictional amount.

### **Reasons for Granting the Writ**

1. **The court below has decided an important question of federal law which has not been but should be, decided by this Court.**

In its decision in *Burstyn v. Wilson*, 343 U. S. 195 (1952), this Court squarely held that motion pictures were a medium of communication entitled to the protective mantle of the First Amendment. In the *Burstyn* case the motion picture "The Miracle" had been banned by the New York censors on the ground that it was sacrilegious. This Court proceeded to void the action of the New York censors, holding that in no event could a standard such as sacrilege be upheld. This Court did not reach the ultimate issue of whether a state or municipality may require censorship of motion pictures for content under other standards. Thus, while censorship of newspapers and other media

of communication protected by the First Amendment is clearly void (*Near v. Minnesota*, 283 U. S. 697 (1931) and cases following), it is not clear whether a state or municipality may require such censorship of motion pictures under a "clearly drawn" statute or ordinance. The specific question reserved by this Court in the *Burstyn* decision (343 U. S. at 506) is thus squarely presented by this case.

As a result of the question left open in the *Burstyn* case, most decisions involving the constitutionality of movie censorship which have come out of the lower courts since the *Burstyn* case have been limited to a determination of whether the particular standard used in the statute or ordinance was more, or less, clearly drawn than the New York standard struck down in the *Burstyn* case. And although this Court has voided a number of statutes on the authority of the *Burstyn* case, and reversed a number of lower court decisions upholding the banning of motion pictures, it has not had the occasion to pass upon the ultimate issue. Consequently an important area of federal law has become beclouded, resulting in extended litigation and in contradictory decisions by lower courts. It has also put this Court, the state courts and the lower federal courts in the position of being a super censor to review the decisions of state and local censorship authorities.

Attached to this Petition as Appendix C is a progeny of this uncertainty, showing the litigation which has arisen from the Chicago ordinance alone since the *Burstyn* case. This petitioner has been involved in three of those cases in Chicago. The "Chicago system" requires extensive and expensive litigation to clear motion pictures banned by the censors. Such a system

obviously has the effect of discouraging the untrammelled communication of ideas which the First Amendment sought to project and which by the *Burstyn* case encompasses motion pictures. Appendix C is further significant, aside from its quantity, in its uniformity of results. In not one instance have the censors been upheld. The courts, in several instances appellate courts including this Court, have had to be censors *de novo* to reverse the results of the censors' findings. As the various opinions of this Court in *Kingsley International Pictures Corp. v. Regents of the University of the State of New York*, 358 U. S. 897 (1958) indicate, this is a function not peculiarly suited to courtroom litigation. A resolution of the ultimate question presented by this case can relieve the courts of their present duties as "super censors."

The ultimate issue cannot and should not be resolved by a lower court. It can be finally resolved only by this Court and certiorari should, therefore, be granted to clear up the confusion in this field by applying to the exhibition of motion pictures the same cardinal principles governing the other media of communication, which principles uniformly condemn censorship of content.

2. **The Court below has decided a federal question in a manner conflicting with the applicable decisions of this Court.**

In the decisions subsequent to the *Burstyn* case, this Court has consistently voided the various statutes and ordinances seeking to censor motion pictures. The standards used in the Chicago ordinance are identical to the standards struck down in such cases. Thus, in

*Holmby Productions, Inc. v. Vaughn*, 350 U. S. 870 (1955), this Court, in a *per curiam* decision, held invalid a Kansas statute providing for censorship of all films and for the banning of those which were "immoral and obscene." The Kansas Supreme Court had specifically narrowed the issue to that of the constitutionality of the standard used in that statute. None of the other standards used in the Chicago ordinance here in question can withstand the constitutional tests laid down in the *Burstyn* case, the *Holmby* case, the *Kingsley* case and other cases decided by this Court. Section 155-4 of the ordinance requires denial of a permit for any motion picture which "portrays depravity, criminality, or lack of virtue of a class of citizens of any race, color, creed, or religion and exposes them to contempt, derision, or obloquy, or tends to produce a breach of the peace or riots, or purports to represent any hanging, lynching, or burning of a human being." We submit that all of these "standards" fall within the prescription set forth by this Court in the various cases cited above.

We submit that the basis of the opinion of the Court of Appeals is in square conflict with the principles of the *Burstyn* case. The Court of Appeals drew a distinction between newspapers and motion pictures stating as follows:

"Plaintiff makes clear its contention that the city's power is limited to punishment after the fact, just as it is in other areas of criminal law. If that contention is correct, thus barring censorship before a film is exhibited in public theaters, actual prior restraint will scarcely exist as to the exhibition of a film in theatres. While it is com-



mon knowledge that the responsible owners of newspapers and television broadcasting systems respectively exercise a wholesome, voluntary censorship over newspapers and television, no similar regulation of the exhibition of moving picture films in theaters is as effectively exercised by private industry. The arrest and prosecution of employees of theaters who exhibit films charged with obscenity, inciting to riot, and the other proscriptions mentioned in the ordinance under consideration is at most a theoretical remedy of prevention."

We submit that it is *not* common knowledge that the theater industry is less responsible than the newspaper or the television industry. Moreover, even if it *were* common knowledge, the "responsibility" of a particular industry cannot be the basis for different constitutional protections.

As to the lower court's contention that petitioner had no standing in court and could not raise the constitutional issue, this was erroneous. Petitioner complied with all requirements of the licensing law except as to the submission of the film. Petitioner has received no benefits under the ordinance and is, therefore, at complete liberty to attack that precise part of the law to which it has not submitted itself, to wit, the censorship scheme contained in the ordinance. In *Union Pacific RR Co. v. Public Service Commission*, 248 U. S. 67 (1918), this Court admitted an attack upon a licensing scheme after a license had been applied for. In the *Burstyn* case, this Court passed on the constitutional issue after a license had been issued for the showing of the film and was later withdrawn.

In the case before this Court, the lower court held that:

"Without knowledge of this film's contents, the district court and we are not in a position to determine whether plaintiff has a right to exhibit its film without city censorship."

The contradiction in this statement is patent, as censorship would be a fait accompli once the film were shown to the city in advance of exhibition. In *American Civil Liberties Union v. City of Chicago*, 3 Ill. 2d 334, 121 N. E. 585 (1955), the Illinois Supreme Court placed a construction on the ordinance in question which requires every reviewing court to try the facts *de novo* and in effect places each reviewing court in the role of the censor board. Under this construction, petitioner could never challenge the constitutionality of the censorship requirement since each court itself must act as the censor. If, as petitioner contends, such censorship provisions are unconstitutional, it is entitled to a permit on the payment of the license fee, which was tendered to the City.

The Stipulation of Facts clearly states that petitioner has been "directly damaged by not being permitted to exhibit said motion picture film" (R-26). The Stipulation further makes it clear that petitioner was prohibited from exhibiting the motion picture under penalty of arrest and fine (R-25). This clearly puts the case out of the realm of theoretical questions. If the requirement of submission for censorship of content is constitutional, then petitioner's case is one of *damnum absque injuria*. If such requirement is not constitutional, however, petitioner is entitled



to redress of its damage by a direction that the city issue a permit.

Equity has jurisdiction to stop the damage caused by the city's ban, without necessitating exposure by petitioner to criminal prosecution and oppressive fines, which a violation of the ordinance would, by its terms, entail. *Terrace v. Thompson*, 263 U. S. 197 (1923) and cases following.

Indeed, the argument is much more impelling that the censorship scheme is wholly unnecessary since Illinois, like most other states, has criminal laws prohibiting the public exhibition of hard core pornography and other objectional material which no one seeks to defend. Ill. Rev. Stat. 1959, Ch. 38, Section 470. It is under such a law that the city and state should exercise whatever control is necessary rather than the ordinance such as the one in question. The Court of Appeals for the 7th Circuit itself made this point in *Capitol Enterprises, Inc. v. City of Chicago*, 260 F. 2d 670, 672 (C. A. 7, 1958) when it said:

"But, there is a wide chasm between censoring motion pictures before deciding if they can be publicly exhibited and exhibiting a picture to the public for which criminal punishment might be imposed. In the latter situation all the familiar procedural safeguards come into play while in the other instance there are no procedural safeguards and communication is choked off at the threshold. Submission to compulsory censorship as a condition precedent to public exhibition is undoubtedly more facile unencumbered, as it is, by any procedural safeguards. Complete censorship, as we now have before us, is much like the

case of obtaining indictments before a grand jury—no defense counsel is present. There, however, the analogy ends for persons accused of crime are eventually accorded some rights, but in censorship social context may be measured by six or seven persons against, as here, a society of more than approximately 3,620,962 persons; and the applicant for a permit apparently need never be heard, nor is the right to trial by petit jury available.”

(There the court reversed the censors on another motion picture arising out of the Chicago ordinance.)

The protection which the court below believed necessary for the state and city to have could best be afforded under the criminal law with its attendant safeguards rather than under the precensorship ordinance here in question with its attendant objections.

## CONCLUSION

**For the foregoing reasons, this Petition for Writ for Certiorari should be granted.**

FELIX J. BILGREY  
144 West 57th Street  
New York 19, New York

ABNER J. MIKVA  
231 South LaSalle Street  
Chicago 4, Illinois

*Counsel for Petitioner*

**APPENDIX A****Memorandum and Order****IN THE UNITED STATES DISTRICT COURT.****\* \* (Caption—58-C-968). \* \*****MEMORANDUM AND ORDER.****CAMPBELL, District Judge.**

This action arises pursuant to the Complaint filed by Times Film Corporation against the City of Chicago, Mayor Richard J. Daley and Police Commissioner Timothy J. O'Connor, and is submitted on the basis of a stipulation of facts for final decision.

Pursuant to the provisions of Sections 155-1 to 155-7 of the Municipal Code of Chicago, plaintiff applied to defendant, O'Connor for a permit to exhibit the motion picture, "Don Juan". Defendant O'Connor notified plaintiff that he would not issue such a permit because such permit could only be granted after the film had been produced at the office of the Commissioner of Police for examination. Plaintiff refused to so submit such film, but appealed to defendant Daley who denied the appeal. Because of plaintiff's refusal to produce the film at the office of the Commissioner of Police and the consequent denial of a permit, plaintiff is prohibited from exhibiting the motion picture "Don Juan" under penalty of a fine of not less than \$50.00 nor more than \$100.00 for each day the picture is exhibited without a permit.

Plaintiff alleges that said ordinance is void on its face as a prior restraint in violation of the 1st and 14th Amendments to the Constitution of the United States.

## Appendix A

## Memorandum and Order

and prays for injunctive relief in order to exhibit the said film in the City of Chicago.

It is my opinion that I am without jurisdiction to hear this cause on many grounds.

First: Before I can be called upon to pronounce this Statute unconstitutional—the most “important and delicate duty of this Court which is only to be used as a “last resort”—there must exist a “justiciable controversy.” In my opinion, no such controversy exists. *Muskrot v. U. S.*, 219 U. S. 346; *Skelly Oil Co. v. Phillips*, 339 U. S. 667, 672; *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U. S. 583, 597-598; *U. S. v. Johnson*, 319 U. S. 302; *Willing v. Chicago Auditorium*, 277 U. S. 274; *Liberty Warehouse Co. v. Granis*, 273 U. S. 70, 74-76; *Steamship Co. v. Emigration Commissioners*, 113 U. S. 33, 39; *Oldland v. Gray*, 179 F. 2d 408; *Coffman v. Federal Laboratories*, 55 F. Supp. 501. Nor has there been presented, a “substantial” federal question. *Gully v. First National Bank*, 299 U. S. 109, 114. Nor has plaintiff suffered a direct or threatened injury. *Hague v. C. L. O.*, 307 U. S. 496, 507, 508; *Frothingham v. Mellon*, 262 U. S. 447.

Second: In essence, the Complaint is concerned with the exhibition of the film, “Don Juan” in the City of Chicago. Had plaintiff submitted said film for examination by the Commissioner of Police as the Ordinance requires, the Commissioner may have approved the film which would have, of necessity, dispelled any need for legal action. The cases are legion

## Appendix A

## Memorandum and Order

which hold that one who has failed to make proper application, is not at liberty to complain because of his anticipation of improper or invalid action. *Bourjois v. Chapman*, 301 U. S. 183, 188; *Dist. of Columbia v. Clawans*, 300 U. S. 608, 616; *Smith v. Cahoon*, 283 U. S. 553, 562; *Lehon v. City of Atlanta*, 242 U. S. 53, 56; *Gundling v. Chicago*, 177 U. S. 183, 186. And see *Kingsley Inter. Pic. Corp. v. City of Providence, R. I.*, 166 F. Supp. 456, 460.

Plaintiff cannot seriously contend that prior restraint of motion pictures is, per se, a violation of the 1st and 14th Amendments. *Joseph Burstyn Inc. v. Wilson*, 343 U. S. 495, 502. Plaintiff has also failed to analyse *Times Film Corporation v. City of Chicago*, 355 U. S. 35 which presumptively sustains the constitutionality of the Ordinance in question in the light of *American Civil Liberties Union v. City of Chicago*, 3 Ill. 2d 334, 121 NE. 2d 585, though reversing on the "facts". It is therefore impossible to contend that the Ordinance is "void on its face". (I take into consideration *Paramount Film Distributing Corp. v. City of Chicago*, (58 C 437), which recently declared one section of the Ordinance unconstitutional).

Third: Plaintiff has not been restricted from the exhibition of the film "Don Juan" except by the statutory sanction of a fine. That such a fine would be levied against plaintiff if plaintiff exhibited said film is not only hypothetical but also "too remote and abstract an inquiry for the proper exercise of the judicial function". *Longshoremen's Union v. Boyd*, 347 U. S. 222, 224; *United Public Workers v. Mitchell*, 330 U. S.

## Appendix A

## \*Memorandum and Order

75, 89-91; *New Jersey v. Sargent*, 269 U. S. 328. This cause falls within the self imposed restraints upon the federal courts so well expressed by Mr. Justice Brandeis in *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 345 *et seq.* Also see *United States v. Auto Workers*, 352 U. S. 567, 590, 591.

Fourth: Without specific allegations, plaintiff broadly contends that said Ordinance is void on its face as a prior restraint in violation of the 1st and 14th Amendments to the Constitution of the United States. This type of "scatter-shot" attack upon the constitutionality of a statute has been expressly condemned. *Staub v. City of Barley*; 355 U. S. 313, 332.

Fifth: Here, since plaintiff has not and will not suffer an immediate and irreparable harm, I am without equitable jurisdiction to grant the injunctive relief requested. *Kingsley Inter. Pic. Corp. v. City of Providence, R. I.*, supra, *Douglas v. City of Jeanette*, 319 U. S. 157. A federal court of equity should only interfere with the enforcement of state laws to prevent irreparable injury which is clear and imminent. *American Federation of Labor v. Watson*, 327 U. S. 582, 593.

Judgment for defendants. Cause dismissed at plaintiff's costs.

CAMPBELL,  
Judge.

May 29, 1959.

**APPENDIX B**

**Opinion of Circuit Court**  
**IN THE**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE SEVENTH CIRCUIT**

No. 12717 SEPTEMBER TERM, 1959

SEPTEMBER SESSION, 1959

---

**TIMES FILM CORPORATION**, a New York corporation,  
Plaintiff-Appellant,

v.

**THE CITY OF CHICAGO**, a municipal corporation,  
**RICHARD J. DALEY**, its mayor, and **TIMOTHY J.**  
**O'CONNOR**, its police commissioner,  
Defendants-Appellees.

---

**APPEAL FROM THE UNITED STATES DISTRICT COURT OF**  
**THE NORTHERN DISTRICT OF ILLINOIS,**  
**EASTERN DIVISION.**

---

November 27, 1959.

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Before **HASTINGS**, *Chief Judge*, and **SCHNACKEN-**  
**BERG** and **KNOCH**, *Circuit Judges*.

**SCHNACKENBERG**, *Circuit Judge*. From a judgment  
for defendants, The City of Chicago, a municipal



*Appendix B'**Opinion of Circuit Court*

corporation, Richard J. Daley, its mayor, and Timothy J. O'Connor, its police commissioner, dismissing the plaintiff's cause, the latter has appealed.

By its complaint, plaintiff sought an order from the district court commanding defendants to forthwith issue to plaintiff the permit required by the city's ordinance, known as §§ 155-1 to 155-7 of the Municipal Code of the City of Chicago, alleging that it applied to O'Connor for a permit to exhibit a motion picture film entitled "Don Juan", but that he did not issue the permit on the ground that such a permit shall be granted only after such film had been produced at his office for examination; that an appeal to defendant Daley proved unsuccessful; and that, without a permit, plaintiff is prohibited from exhibiting said film under penalty of arrest and criminal prosecution, all in denial of plaintiff's rights under the first and fourteenth amendments to the constitution of the United States.

The defendants having answered the complaint, and the facts having been stipulated, the court entered the judgment from which the appeal was taken.

§ 155-1 of the ordinance provides:

"It shall be unlawful for any person to show or exhibit in a public place, or in a place where the public is admitted, anywhere in the city any picture \* \* \* without first having secured a permit therefor from the commissioner of police.

\* \* \* \*

"Any person exhibiting any picture or series of pictures without a permit having been ob-



## Appendix B.

## Opinion of Circuit Court

tained therefor shall be fined not less than fifty dollars nor more than one hundred dollars for each offense. \* \* \*

155-4 of said ordinance reads:

"If a picture or series of pictures, for the showing or exhibition of which an application for a permit is made, is immoral or obscene, or portrays depravity, criminality, or lack of virtue of a class of citizens of any race, color, creed, or religion and exposes them to contempt, derision, or obloquy, or tends to produce a breach of the peace or riots, or purports to represent any hanging, lynching, or burning of a human being, it shall be the duty of the commissioner of police to refuse such permit; otherwise it shall be his duty to grant such permit.

\* \* \* \*

In its complaint, plaintiff has limited its statement of the facts in an obvious attempt to so frame its case that the United States Supreme Court will be persuaded to rule upon the question of constitutionality of motion picture censorship, a course from which, according to Mr. Justice Harlan, *Kingsley Picture Corp. v. Regents of U. of N. Y.*, 360 U. S. 684, 708, the Court has carefully abstained. In plaintiff's paring down of the facts, however, it has reduced the case to an abstract question of law. It is fundamental that, while the courts will adjudicate controversies, they will not announce opinions where concrete issues in actual cases are not set forth. In *United Pub-*

## Appendix B

## Opinion of Circuit Court

*lic Workers v. Mitchell*, 330 U. S. 75, 89, the court said:

“As is well known, the federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues, ‘concrete legal issues, presented in actual cases, not abstractions,’ are requisite. \* \* \*”

The subject matter involved in this case is, according to the complaint, a moving picture film, which is described in no way except as “Don Juan”. The nature of its contents, either generally or specifically, is not revealed by the complaint and is not alleged to have been made known to defendants. The film itself was not tendered to the district court or this court and is not in the record. No one, except those in privity with plaintiff, knows whether the film Don Juan, for which the protection, first of this court, and eventually of the United States Supreme Court, is sought, is a picture of (for instance) a happy Sunday School picnic, a bullfight, or any one of the following (*inter alia*): (a) an immoral or obscene act, (b) exposure of the citizens of any race, color, creed or religion to contempt, derision or obloquy by attributing to them depravity, criminality or lack of virtue, (c) acts tending to produce a breach of the peace or riots, or (d) a hanging, lynching, or burning of a human being. With the physical object constituting the subject matter of this complaint hidden from the court, we are left to guess as to what our holding is to apply. If we grant the relief prayed, we will be sanctioning the public

## Appendix B

### Opinion of Circuit Court

exhibition of we know not what. It might be a portrayal of a school of crime, which, for instance, teaches the steps to be taken in successfully carrying out an assassination of a president of the United States as he leaves the White House; or shows how to arrange an uprising of subversive groups in one of our cities.

Although plaintiff, evidently for strategic purposes, refuses to take a stand which will reveal the contents of the film, certain arguments in its brief point strongly to the fact that the film is one subject to a charge of obscenity. Most of the cases cited by it involve that charge. Specifically, plaintiff refers to *Times Film Corp. v. City of Chicago*, 244 F. 2d 432, where we considered a film charged to be obscene. The brief of counsel for the plaintiff in the case at bar quotes at great length from the report of a master in chancery in that case, only a small part of which we set forth below:

"At least it cannot be concluded that, for the purposes of limiting the basic constitutional protection to freedom of expression, arousal of sexual desires in normal persons is in the same category as danger to the nation at war, or incitements to riots and acts of violence, or to the overthrow by force of orderly government, or even with expressions which have the effects of force."

The same ordinance is involved in both that case and this. We may fairly infer that, in plaintiff's opinion, obscenity is in the same category, for present purposes, with incitement to riots.

## Appendix B

## Opinion of Circuit Court

We recognize that there may be differences of opinion as to whether a film, if it tends to produce a breach of the peace or riots, is entitled to be shown in a theater repeatedly as long as the theater manager is willing to post appearance bonds following repeated arrests for violation of the criminal sections of the ordinance, or whether such a showing of the film should await its approval by a censorship board. But those differences should be resolved by a court having possession of the full facts, none of which is more relevant than the film itself. We would not emulate the play of Hamlet without Hamlet. Without the film before the court, we are presented with a hypothetical case in which even the hypothesis is incomplete. We are being asked to adjudicate an abstract question of law, based upon an incomplete skeleton of facts. Without knowledge of the film's contents, the district court and we are not in a position to determine whether plaintiff has a right to exhibit its film without city censorship.

In *Longshoremen's Union v. Boyd*, 347 U. S. 222, the court said, at 224:

“\* \* \* That is not a lawsuit to enforce a right; it is an endeavor to obtain a court's assurance that a statute does not govern hypothetical situations that may or may not make the challenged statute applicable. Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function. *United Public Workers v.*

*Appendix B**Opinion of Circuit Court*

*Mitchell*, 330 U. S. 75; see *Muskrat v. United States*, 219 U. S. 346, and *Alabama State Federation of Labor v. McAdory*, 325 U. S. 450. Since we do not have on the record before us a controversy appropriate for adjudication, the judgment of the District Court must be vacated, with directions to dismiss the complaint."

Plaintiff makes clear its contention that "the city's power is limited to punishment after the fact, just as it is in other areas of criminal law." If that contention is correct, thus barring censorship before a film is exhibited in public theaters, actual prior restraint will scarcely exist as to the exhibition of a film in theaters. While it is common knowledge that the responsible owners of newspapers and television broadcasting systems respectively exercise a wholesome, voluntary censorship over newspapers and television, no similar regulation of the exhibition of moving picture films in theaters is as effectively exercised by private industry. The arrest and prosecution of employees of theaters who exhibit films charged with obscenity, inciting to riot, and the other proscriptions mentioned in the ordinance under consideration, is at most a theoretical remedy of prevention. It would be practically ineffectual, especially in this case. Plaintiff, owner of the film, is a New York corporation, having its place of business in New York City. It does not appear that it has any headquarters in Illinois. A criminal prosecution against the operator of the projector showing the film in a theater in Chicago, or against some other employee of the theater, would be practi-

*Appendix B**Opinion of Circuit Court*

cally doomed to failure as a means of stopping the showing of the film. Even if such a prosecution finally culminated in a conviction, in the meantime the damage caused by the showing of the film would have been done. A film which incites a riot produces that result almost immediately after it is shown publicly. Likewise, the effect upon the prurient mind of an obscene film may result harmfully to some third person within hours after the film has been shown. These are disadvantages of the doctrine of limiting the power of the city to punishment after the fact, for which plaintiff contends.

We have briefly referred to some of the considerations which bear upon the abstract question presented by plaintiff. The film not being before the court, no hypotheses will be assumed to apply to its contents. For the reasons hereinbefore set forth, the judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

A true Copy:

Teste:

.....  
Clerk of the United States Court of  
Appeals for the Seventh Circuit.

## APPENDIX C

### List of Cases Arising Under Municipal Ordinance in Question

*American Civil Liberties Union v. City of Chicago*,  
3 Ill. 2d 334, 121 N. E. 2d 585 (1955) (*The Miracle*):

Censor Board: Obscene and immoral.

Ill. Supreme Court: Reversed and remanded for further proceedings.

U. S. Supreme Court: Refused review for want of final judgment. Three Justices dissenting.

Trial Court: Obscene and immoral.

Ill. Appellate Court: Not obscene or immoral.

Permit issued.

*Times Film Corporation v. City of Chicago*,  
355 U. S. 35 (1957) (*The Game of Love*):

Censor Board: Obscene and immoral.

Master's Findings: Not obscene or immoral, ordinance unconstitutional.

Advisory Jury: 11 to 1. Obscene and immoral.  
(Without instructions.)

Trial Court: Obscene and immoral, ordinance constitutional.

U. S. Ct. of Appeals: Obscene and immoral, ordinance constitutional.

U. S. Supreme Court: Reversed per curiam.

Permit issued.



## Appendix C

*List of Cases Arising Under Municipal Ordinance in Question*

***Times Film Corporation v. City of Chicago,***  
U. S. District Ct., Northern District of Ill.,  
Eastern Division, 57 C 2017 (*Nana*):

Censor Board: Obscene and immoral.  
Settled after suit was filed.

**Permit issued.**

***Paramount Films v. City of Chicago,***  
U. S. District Ct., Northern District of Ill.,  
Eastern Division, 58 C 437 (*Desire Under the Elms*):

Censor Board: Adults only.

Trial Court: That section of ordinance unconstitutional.

**Permit issued.**

***Capitol Enterprises v. City of Chicago,***  
260 F. 2d 670 (C. A. 7, 1958) (*Mom and Dad*):

Censor Board: Obscene and immoral.

Trial Court: Obscene and immoral, ordinance constitutional.

U. S. Ct. of Appeals: Not obscene or immoral.

**Permit issued.**

***Columbia Pictures Corp. v. City of Chicago,***  
U. S. District Ct., Northern District of Ill.,  
Eastern Division, 59 C 1058 (*Anatomy of a Murder*):

Censor Board: Obscene and immoral.

Trial Court: Not obscene or immoral.

**Permit issued.**

**APPENDIX D****Relevant Portions of Municipal Code of Chicago****Chapter 155.****Motion Pictures.****Exhibition.**

155-1. It shall be unlawful for any person to show or exhibit in a public place, or in a place where the public is admitted, anywhere in the city any picture or series of pictures of the classes or kinds commonly shown in mutoscopes, kinetoscopes, or cinematographs, and such pictures or series of pictures as are commonly shown or exhibited in so-called penny arcades, and in all other automatic or motion picture devices, whether an admission fee is charged or not, without first having secured a permit therefor from the commissioner of police.

It shall be unlawful for any person to lease or transfer, or otherwise put into circulation, any motion picture plates, films, rolls, or other like articles or apparatus, from which a series of pictures for public exhibition can be produced, to any exhibitor of motion pictures, for the purpose of exhibition within the city, without first having secured a permit therefor from the commissioner of police.

The permit herein required shall be obtained for each and every picture or series of pictures exhibited and is in addition to any license or other imposition required by law or other provision of this code.

*Appendix D**Relevant Portions of Municipal Code of Chicago*

Any person exhibiting any picture or series of pictures without a permit having been obtained therefor shall be fined not less than fifty dollars nor more than one hundred dollars for each offense. A separate and distinct offense shall be regarded as having been committed for each day's exhibition of each picture or series of pictures without a permit. (Amend. Coun. J. 12-21-39, p. 1396).

155-4. Such permit shall be granted only after the motion picture film for which said permit is requested has been produced at the office of the commissioner of police for examination or censorship.

If a picture or series of pictures, for the showing or exhibition of which an application for a permit is made, is immoral or obscene, or portrays depravity, criminality, or lack of virtue of a class of citizens of any race, color, creed, or religion and exposes them to contempt, derision, or obloquy, or tends to produce a breach of the peace or riots, or purports to represent any hanging, lynching, or burning of a human being, it shall be the duty of the commissioner of police to refuse such permit; otherwise it shall be his duty to grant such permit.

In case the commissioner of police shall refuse to grant a permit as hereinbefore provided, the applicant for the same may appeal to the mayor. Such appeal shall be presented in the same manner as the original application to the commissioner of police. The action of the mayor on any application for a permit shall be final.

155-5. In all cases where a permit for the exhibi-

*Appendix D**Relevant Portions of Municipal Code of Chicago*

tion of a picture or series of pictures has been refused under the provisions of the preceding section because the same tends towards creating a harmful impression on the mind of children, where such tendency as to the minds of adults would not exist if exhibited only to persons of mature age, the commissioner of police may grant a special permit limiting the exhibition of such picture or series of pictures to persons over the age of twenty-one years; provided, such picture or pictures are not of such character as to tend to create contempt or hatred for any class of law abiding citizens. -

When such special permit has been issued, it shall be unlawful for any person exhibiting said picture to allow any persons under the age of twenty-one years to enter the place where same is being exhibited, or to remain in said place while any part of said picture or series of pictures is being shown.

**FILE COPY**

Office-Supreme Court, U.S.

**FILED**

**MAR 2 1960**

**JAMES R. BROWNING, Clerk**

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1959.

**No. ~~689~~ 34**

**TIMES FILM CORPORATION,**

*Petitioner,*

*vs.*

**CITY OF CHICAGO, RICHARD J. DALEY AND  
TIMOTHY J. O'CONNOR,**

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

**BRIEF FOR RESPONDENTS IN OPPOSITION.**

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*Of Counsel.*

/

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1959.

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No. 689.

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TIMES FILM CORPORATION,  
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**BRIEF FOR RESPONDENTS IN OPPOSITION.**

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**OPINIONS BELOW.**

The opinions below are adequately set forth in the Appendixes A and B of the Petition. The opinion of the United States Court of Appeals for the Seventh Circuit is now reported as *Times Film Corporation v. City of Chicago* (1959), 272 F. 2d 90.

**QUESTIONS PRESENTED.**

Petitioner has failed to fully apprise this Court of the following issues:

1. Does the Court have jurisdiction?
2. Is there a justiciable controversy?

3. Is there a "substantial" federal question?
4. Has petitioner suffered a direct or threatened injury?
5. May one who has failed to make proper application for a permit to exhibit a motion picture attack the validity of the ordinance requiring such application because of his anticipation of improper or invalid action?
6. Is prior restraint of motion pictures, *per se*, a violation of the 1st and 14th Amendments?
7. Is the inquiry here involved too remote and abstract for the proper exercise of the judicial function?
8. May a "scatter-shot" attack upon the constitutionality of an ordinance, without specific allegations, be sustained?
9. Has petitioner proven that it will suffer an immediate and irreparable harm so as to justify the intervention of a court of equity?

The foregoing were the issues before the District Court (Petition, pp. 2a-4a) and the United States Court of Appeals (*Times Film Corporation v. City of Chicago*, 272 F. 2d 90). Therefore, they must also be the issues before this Court.



## ARGUMENT.

## I.

The decision of the court below does not involve an important question of federal law which should be settled by this Court.

Petitioner contends as a basis for granting the writ that the court below has decided an important question of federal law not heretofore ruled upon by this Court (Petition, pp. 4-6). Such a contention is without foundation.

It is significant that petitioner fails to point out the factors which motivated the trial court and the court below in their decisions. However, a mere reading of the opinions below (Petition, pp. 1a-4a; *Times Film Corporation v. City of Chicago*, 272 F. 2d 90) conclusively demonstrates that petitioner's contentions in this Court bear no relationship to the issues which arose below and which formed the basis of the decisions below.

The decision below involves the application of familiar principles of constitutional law and it fully conforms with this Court's prior decisions. No novel issue of law is present. As the court below found (*Times Film Corporation v. City of Chicago*, 272 F. 2d 90, 91), petitioner has reduced the facts to an abstract question in the hope that this Court will accept them and rule on the validity of a municipal ordinance without any knowledge as to the subject matter of the motion picture to which the ordinance is applicable.

The great constitutional safeguards pertaining to freedom of speech and of the press under the First and Fourteenth Amendments are not involved in this proceeding.

Petitioner refers to them and relies upon them. But petitioner can have no standing in this Court when it refuses to relate or exhibit the nature of the film in question.

Petitioner's first reason for granting the writ is that the court below has "decided an important question of federal law which has not been but should be, decided by this Court" (Petition, p. 4). This is, of course, only a verbatim iteration of Rule 19 (1) (b) of this Court. However, petitioner wholly fails to tell this Court what the purported "important question of federal law" might be, as related to the facts in this case. On the other hand, the District Court found there was no "substantial" federal question (Petition, Appendix A, page 2a). While the Circuit Court held that the case "has been reduced \* \* \* to an abstract question of law" (*Times Film Corporation v. City of Chicago*, 272 F. 2d 90, 91).

Although petitioner does not so state, we can only assume that petitioner is fearful that exhibition of its film may be denied because of obscenity. At least, all of the authorities upon which petitioner relies are concerned with this subject. Appendix C attached to the Petition (pp. 13a, 14a) lists cases, not one of which overthrows the validity of the ordinance under consideration. In fact, *American Civil Liberties Union v. City of Chicago* (1955), 3 Ill. 2d 334, 121 N. E. 2d 585, specifically and unequivocally sustained the constitutionality of the ordinance as did *Times Film Corporation v. City of Chicago* (1957), 244 F. 2d 432 (C. A. 7); 355 U. S. 35. The fact that subsequently the motion pictures there involved were permitted to be shown does not affect the constitutionality of the ordinance. Because it was decided that such motion pictures were not, in point of fact, obscene, and therefore allowable, does not change in any way the positive position of the various courts on the issue of the constitutionality of the ordinance. This Court, also, has gone on record as approving rejection

of motion pictures on the ground of obscenity. *Roth v. United States (Alberts v. California)* (1957), 354 U. S. 476. We are nonplussed by petitioner's failure to cite this case. It was relied upon (and cited) by both parties in the court below. It would be decisive of the issues here if obscenity or constitutionality were involved.

But, the only issue before this Court, as proven by the memorandum order of the trial court (Petition, Appendix A, p. 2a) and the opinion of the Court of Appeals (*Times Film Corporation v. City of Chicago*, 272 F. 2d 90), is whether or not there is a justiciable controversy. This was effectively answered by this Court in *Smith v. Cahoon* (1931), 283 U. S. 553. The relevance of the *Smith* case and the issue of justiciable controversy were argued by both parties in their briefs filed in the court below. Strangely, petitioner has now shied away from this issue.

## II.

**The court below did not decide a federal question in a manner conflicting with the applicable decisions of this Court.**

Petitioner contends (Petition, p. 6) that the court below has decided a federal question in a manner conflicting with the applicable decisions of this Court. Again, petitioner merely iterates the provisions of Rule 19(1)(b) in stating this conclusion.

It is significant that petitioner first argues that the court below decided a question which *has not been*, but should be, decided by this Court (Petition, p. 4), and that petitioner now argues that the court below decided a question in conflict with the applicable decisions of this Court (Petition,

p. 6). This seems to us to be paradoxical. Both statements cannot be true. One must fall if the other is correct. Apparently, petitioner disregarded their contradictory aspects.

Petitioner states (Petition, p. 7) that the decision of the court below is in conflict with this Court's decision in *Burstyn v. Wilson* (1952), 343 U. S. 495. Having stated this conclusion, petitioner leaves the assessment of its merits to respondents and to this Court. Petitioner, itself, does not demonstrate the alleged "conflict." The fact is that the issues in this case are entirely different from those in the *Burstyn* case. The memorandum order of the trial court and the opinion of the court below show clearly the issues. The *Burstyn* case stands for the proposition that the word "sacrilegious" is vague and indefinite. It also holds that the constitutional safeguards implicit in the First and Fourteenth Amendments are applicable to motion pictures. We do not gainsay these things, but their relevance is questioned.

In the *Burstyn* case this Court held it was not necessary for the Court to decide "whether a state may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene films" (p. 506). And in *Roth v. United States* (*Alberts v. California*) (1957), 354 U. S. 476, this Court stated (p. 481):

"The dispositive question is whether obscenity is utterance within the area of protected speech and press. Although this is the first time the question has been squarely presented to this Court, either under the First . . . or . . . Fourteenth Amendment, expressions found in numerous opinions indicate that this Court has always assumed that obscenity is not protected by the freedoms of speech and press."

and again (pp. 484, 485):

"But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. \* \* \*

"*We hold that obscenity is not within the area of constitutionally protected speech or press.*" (Emphasis supplied.)

Thus, it is apparent that there is no merit to petitioner's contentions, even if obscenity were involved. The decision of the court below is not in conflict with the *Burstyn* case, nor with any other decision of this Court.

Petitioner is employing the same vague generalizations that it employed in the courts below. The end result is the same. No one knows what petitioner asks this Court to approve. Petitioner seeks from respondents, and from this Court, carte blanche or a blank check vesting in petitioner the unparalleled right to exhibit a motion picture depicting something unknown to any of us.

### Conclusion.

We have demonstrated that there is no justiciable controversy because petitioner failed to make the required application for a license and that petitioner is anticipating improper action without any foundation in fact.

We have further shown that no novel question of federal law is present nor was any decided by the court below.

We have also proven that the decision of the court below is not in conflict with the prior decisions of this Court.

Finally, we have shown that petitioner has deliberately set about to create a narrowed down, abstract set of facts in a futile effort to persuade this Court to pass on constitutional questions which were not in issue or were not decided by the court below.

Wherefore, respondents pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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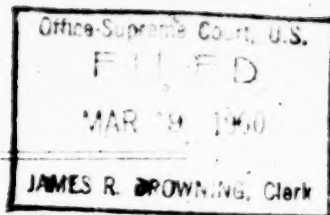
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Writ

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*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

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**REPLY BRIEF FOR PETITIONER**

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IN THE  
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**REPLY BRIEF FOR PETITIONER**

Respondents have stumbled onto the *real* issue in this case in alleging that we seek "carte blanche vesting in petitioner the unparalleled right to exhibit a motion picture depicting something unknown to any of us" (Brief for Respondents in Opposition, p. 7). To exhibit the "unknown", is far from being an "unparalleled right": it is precisely what the First Amendment guarantees us by its negative command. We respectfully submit that this right to show the "unknown" applies to *all* media of communication, that this right extends to petitioner's motion picture—and to all motion pictures—and that the censorship provisions of the Chicago ordinance must fall, as standing in the way of this constitutional right.

Nothing in this Court's holding in *Alberts v. California*, 354 U. S. 476, (1957) would give comfort to respondents' new legal theory that that decision is an open sesame for city hall censorship. *This Court has been consistent in striking down such censorship, both before and after the Alberts decision.*

Respondents' allegation that there is no justiciable controversy on the ground that petitioner has failed to make the "required application for a license" (Brief for Respondents in Opposition, p. 7) is sham, since petitioner has in fact complied with every single requirement of the ordinance—but for the censorship provision.

In alleging that petitioner is "anticipating improper action without any foundation in fact" (Brief for Respondents in Opposition, p. 7), respondents seem to be playing ostrich to a decade of protracted litigation in this field, some of it between them and the petitioner (See Petition, Appendix C, p. 13a). Respondents know—and have so stipulated—that non-compliance by petitioner with the censorship provision of the ordinance would expose it to penalties, fines and arrest. Petitioner has sufficiently demonstrated that no more immediate and irreparable harm could befall it by being precluded from showing its motion picture by virtue of respondents' unconstitutional actions. *Equity will assume jurisdiction under such circumstances to prevent the damage. Terrace v. Thompson*, 263 U. S. 197 (1923) and line of cases following (ignored by respondents).

We can attribute respondents' stand only to their fervent desire to continue permanently its unconstitutional practice of pre-censoring the entire motion

picture medium in the city of Chicago. *We respectfully pray that this Court stop that practice by striking down the censorship provisions of the ordinance in issue.*

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## TABLE OF CONTENTS.

	PAGE
OPINIONS BELOW .....	1
JURISDICTION .....	1
QUESTION PRESENTED .....	2
STATUTES INVOLVED .....	2
STATEMENT .....	3
SUMMARY OF ARGUMENT .....	4
ARGUMENT .....	6
I. THERE IS A JUSTICIABLE CONTROVERSY BETWEEN THE PARTIES INVOLVING A SUBSTANTIAL FEDERAL QUESTION .....	6
II. THOSE SECTIONS OF THE CHICAGO ORDINANCE WHICH REQUIRE SUBMISSION OF MOTION PICTURES FOR CENSORSHIP PRIOR TO PUBLIC EXHIBITION ARE VOID AS A PRIOR RESTRAINT ON FREEDOM OF SPEECH AND OF THE PRESS .....	13
1. Motion Pictures Are Part of Speech and of the Press and Cannot Be Censored in Ad- vance of Public Exhibition.....	13
2. Censorship of the Ideas Communicated by Speech or the Press Has Never Been Allowed	18
3. The Exhibition of Motion Pictures Presents No Such Exceptional Problems as Would Justify Prior Censorship.....	27
CONCLUSION .....	35
APPENDIX A .....	39

## TABLE OF CITATIONS.

*Cases.*

Alberts v. California, 354 U. S. 476 (1957).....	30
American Civil Liberties Union v. City of Chicago, 3 Ill. 2d 334, 121 N. E. 2d 585 (1955), 348 U. S. 979 (1955), 13 Ill. App. 2d 278 (1957) .....	11, 16, 17
Beauharnais v. Illinois, 343 U. S. 250 (1952) .....	30, 31
Brattle Films v. Commissioner of Public Safety, 127 N. E. 2d 891 (Mass., 1955) .....	15
Burstyn v. Wilson, 343 U. S. 495 (1952) .....	10, 13, 14, 15, 16, 18
Cantwell v. Connecticut, 310 U. S. 296 (1940) .....	14, 20
Capitol Enterprises, Inc., v. City of Chicago, 260 F. 2d 670 (C. A. 7th, 1958) .....	37
Cargill v. Minnesota, 180 U. S. 452 (1901) .....	8
Chaplinsky v. New Hampshire, 315 U. S. 568 (1942) .....	30, 31
Commercial Pictures Corporation v. Regents of the University of the State of New York, 346 U. S. 587 (1954) .....	14
Cox v. New Hampshire, 312 U. S. 569 (1941) .....	23
Dennis v. United States, 341 U. S. 494 (1951) .....	28, 29
Dumont Laboratories v. Carroll, 184 F. 2d 153 (C. A. 3d, 1950), cert. a n. 340 U. S. 929 (1951) .....	14, 32
Gelling v. Texas, 343 U. S. 960 (1952) .....	14
Gitlow v. New York, 268 U. S. 652 (1952) .....	19, 29
Grosjean v. American Press Company, Inc., 297 U. S. 233 (1936) .....	14
Hague v. C. I. O., 307 U. S. 496 (1939) .....	14
Hallmark Productions v. Carroll, 121 A. 2d 584 (Pa., 1956) .....	15

Hannigan v. Esquire, Inc., 327 U. S. 146 (1946) .....	14, 36
Holmby v. Vaughn, 350 U. S. 870 (1955) .....	14
Kingsley Books v. Brown, 354 U. S. 436 (1957) .....	35
Kingsely International Pictures Corp v. Regents of the University of the State of New York, 360 U. S. 684 (1959) .....	13, 14, 15, 26, 32
Kovacs v. Cooper, 336 U. S. 77 (1949) .....	23
Kunz v. New York, 340 U. S. 290 (1951) .....	14
Lovell v. City of Griffin, 303 U. S. 444 (1938) .....	7, 14, 20
Murdock v. Pennsylvania, 319 U. S. 105 (1943) .....	14
Near v. Minnesota, 283 U. S. 697 (1931) .....	14, 19, 24, 27
Niemotko v. Maryland, 340 U. S. 268 (1951) .....	14, 23
Poulos v. New Hampshire, 345 U. S. 395 (1953) .....	23
RKO v. Department of Education, 122 N. E. 2d 796 (Ohio, 1953) .....	15
Roth v. Goldman, 172 F. 2d 788 (C. A. 2d, 1949) .....	34
Schenck v. United States, 249 U. S. 47 (1919) .....	28
Schneider v. State, 308 U. S. 147 (1939) .....	14
Smith v. California, 361 U. S. 147 (1960) .....	19, 21
Staub v. Baxley, 355 U. S. 313 (1958) .....	7, 10, 11, 12
Superior Pictures, Inc. v. Department of Education, 346 U. S. 587 (1954) .....	13, 15
Talley v. California, 362 U. S. 60 (1960) .....	22
Thornhill v. Alabama, 310 U. S. 88 (1940) .....	21
Times Film Corporation v. City of Chicago, 139 F. Supp. 837 (1956), 244 F. 2d 432 (C. A. 7th, 1957), rev'd per curiam 355 U. S. 35 (1957) .....	9, 14, 17, 25
Times Film Corporation v. City of Chicago, U. S. Dis- trict Court, Northern District of Ill., Eastern Divi- sion, 57 C 2017 .....	9



Twentieth Century Fox Film Corporation v. Boehm, et al., Court of Common Pleas of Dolton County, Pennsylvania, No. 2387 in Equity .....	35
United States v. Roth, 237 F. 2d 796 (C. A. 2d, 1956)	36
Winters v. New York, 33 U. S. 507 (1948) .....	14
Yates v. United States, 354 U. S. 298 (1957) .....	28, 29

### *Statutes.*

Constitution of the United States	
First Amendment..2, 3, 4, 6, 13, 15, 18, 20, 33, 36, 37, 38, 43	
Fourteenth Amendment .....	2, 3, 4, 6, 18, 20, 38, 43
Ill. Rev. Stat. (1959), c. 38, § 470 .....	26
Municipal Code of the City of Chicago, c. 155, § 155-1- 155-7 .....	2, 3, 4, 5, 25, 30, 39

### *Miscellaneous.*

Duniway, The Development of Freedom of the Press in Massachusetts, London, 1906 .....	36
"Entertainment: Public Pressures and the Law," 71 Harv. L. Rev. 326 (1957) .....	33
Jahoda, The Impact of Literature (New York Univer- sity, 1957) .....	31
Jefferson, "Statute for Religious Liberty," 12 Hen- ing's Statute, Virginia, 1873 .....	33
Kinsey, Sexual Behavior of the Human Male (W. B. Saunders Company, 1948) .....	33

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**BRIEF FOR THE PETITIONER.**

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**OPINIONS BELOW.**

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, is reported at 180 F. Supp. 843 (1959) (R. 27). The opinion of the Court of Appeals for the Seventh Circuit is reported at 272 F. 2d 90 (C. A. 7th, 1959) (R. 37).

**JURISDICTION.**

The judgment of the Court of Appeals for the Seventh Circuit was entered November 27, 1959 (R. 42). The Petition for Certiorari was filed on February 10, 1960, and granted on March 21, 1960. The Court's jurisdiction rests on 28 U. S. C. § 1254 (1).

### QUESTION PRESENTED.

Are those sections of the Chicago licensing ordinance which require motion pictures to be submitted for censorship of content prior to their public exhibition void as against the First and Fourteenth Amendments of the United States Constitution?

### STATUTES INVOLVED.

The statutory provisions involved are Sections 1 through 7 of Chapter 155 of the Municipal Code of the City of Chicago and the First and Fourteenth Amendments of the United States Constitution. They appear *infra* in Appendix A at pages 39-43. The particularly relevant section of the ordinance is Section 155-4 which reads as follows:

"155-4. Such permit shall be granted only after the motion picture film for which said permit is requested has been produced at the office of the commissioner of police for examination or censorship.

If a picture or series of pictures, for the showing or exhibition of which an application for a permit is made, is immoral or obscene, or portrays depravity, criminality, or lack of virtue of a class of citizens of any race, color, creed, or religion and exposes them to contempt, derision, or obloquy, or tends to produce a breach of the peace or riots, or purports to represent any hanging, lynching, or burning of a human being, it shall be the duty of the commissioner of police to refuse such permit; otherwise it shall be his duty to grant such permit.

In case the commissioner of police shall refuse to grant a permit as hereinbefore provided, the applicant for the same may appeal to the mayor. Such appeal shall be presented in the same manner as the original application to the commissioner of police. The action of the mayor on any application for a permit shall be final."

**STATEMENT.**

The facts in this case are not in dispute and were stipulated to by the parties (R. 25). Petitioner filed its Complaint against the City of Chicago, Mayor Richard J. Daley and Police Commissioner Timothy J. O'Connor, asking the District Court to require the defendants to issue to Petitioner the permit required by the Municipal ordinance and to restrain defendants from interfering with Petitioner's right to exhibit the motion picture *Don Juan* in the City of Chicago.

Petitioner alleged and the defendants acknowledged that Petitioner has the exclusive right to exhibit the motion picture in question and that Petitioner applied for a license to so exhibit it, submitting the permit fee with its application as required. Petitioner, however, refused to submit the motion picture for censorship of content, and for this reason, the Police Commissioner refused to issue a permit. Petitioner thereupon appealed to Mayor Daley in a timely manner pursuant to the ordinance, but the appeal was rejected, again on the ground that Petitioner had failed to submit the picture for censorship of content. Throughout these administrative proceedings, Petitioner had insisted that its refusal to so submit the picture was justified because the requirement for such submission was unconstitutional under the First and Fourteenth Amendments to the United States Constitution. Following these administrative proceedings, Petitioner commenced its lawsuit.

The trial court dismissed the Complaint on the ground that there was no justiciable controversy between the parties and, therefore, the court was without jurisdiction. 180 F. Supp. 843 (1959). The Court of Appeals affirmed the dismissal for similar reasons and for the reason that the ordinance in any event was constitutional. 272 F. 2d 90 (C. A. 7th, 1959).

Accordingly, the Record in the case is short and the only questions involved are matters of law which we submit were decided erroneously by the courts below.

### **SUMMARY OF ARGUMENT.**

I. There is a justiciable controversy between the parties involving a substantial federal question that needs decision by this Court. The right claimed by Petitioner is the fundamental and constitutionally guaranteed right to free speech—free from any government imposed requirement that the speech, in this case a motion picture, be submitted in advance for censorship of content. This is a position which Petitioner has maintained throughout this controversy and one properly before the Court. Petitioner is not challenging the entire licensing system established by the ordinance in question but only those sections which require submission of the motion picture for censorship of content. Petitioner met every other requirement of the ordinance and has the right to make such a challenge without submitting itself to the penalties provided by the ordinance for exhibiting the motion picture without a license. The case, therefore, presents a real issue between real parties to determine whether there is any justification for denying Petitioner rights which have been confirmed as to all other media of communication.

II. The real question presented by the case is whether those sections of the Chicago censorship ordinance which require every motion picture to be submitted for censorship of content prior to public exhibition can withstand a constitutional challenge under the First and Fourteenth Amendments to the United States Constitution. Since motion pictures have become an important medium of communication, they must be treated as part and parcel of

that speech and press which are protected against government interference. The long history of litigation in the motion picture field has made it clear that censorship of ideas communicated by motion pictures can no more be tolerated than censorship of ideas communicated by newspapers, books or magazines.

None of the exceptions which have been carved out from freedom of speech and press as an absolute can be utilized to justify the ordinance in question. There is no "clear and present danger" that motion pictures, *per se*, will subvert the country or the country's morality.

The questions *not* presented by this case shed light on the question that is before the Court. Thus, the Court is not asked to strike down all licensing schemes for all purposes. The distinction is between a license which is ministerial in nature and one that is discretionary in nature. The argument is limited to the position that licensing schemes which demand censorship of content prior to the issuance of a license are discretionary and run afoul of the constitutional mandates. Similarly, this case does not present the question as to whether and by what means the state can punish an exhibitor who transgresses against proper governmental interests, whether by way of obscenity, subversion or incitement to riot. The question again is whether the governmental unit, in this case the city, can seek to defend those legitimate interests by imposing a censorship requirement on all motion pictures.

The question presented by this case is not new to the Court. It has been peripherally involved in many cases during recent years. However, the lower courts have interpreted these decisions in varying ways. In the instant case, the court below has interpreted the rulings of this Court in a manner so at variance with judicial precedent that it ought to be reversed.

## ARGUMENT.

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### **I. THERE IS A JUSTICIABLE CONTROVERSY BETWEEN THE PARTIES INVOLVING A SUBSTANTIAL FEDERAL QUESTION.**

The opinions of the court below and of the trial court are largely based on the conclusion that there is no justiciable controversy between the parties. This then becomes the threshold question of the case.

We submit that the lower courts misconceived the nature of the case. The facts, all of which are stipulated to, make it clear that Petitioner and Respondents have met head-on over the issue of whether Petitioner is entitled to exhibit its motion picture *Don Juan* without submitting it to the Chicago Censor Board for prior review and censorship of content. Petitioner contends that having tendered the license fee and having complied with other aspects of the ordinance, it was entitled to a permit since the requirement of submission for censorship of content violates Petitioner's right to free speech as guaranteed by the First and Fourteenth Amendments to the United States Constitution.

Respondents stand on the ordinance in their refusal to issue the permit. In the stipulation (R. 25), Respondents freely admit that this refusal has directly damaged Petitioner since it is subject to fine for exhibiting the picture without a permit; Respondents contend, however, that the requirement of prior censorship is constitutional and feasible. The controversy is, then, clear-cut and, while confined to the naked question presented by this case, is real and justiciable. We believe that the holdings of the courts below may be summarized as follows:



1. *Petitioner Is in No Position to Complain Because Had It Submitted the Film, the Censor Board Might Have Approved It, and All Would Have Been Well.*

Under such a view, all censorship schemes are constitutional and a great body of judicial opinion, legal literature and constitutional history has been wasted. Such a view presupposes that since all censorship laws are valid, the only question for the courts is whether they have been properly applied. As but one example, *Lovell v. City of Griffin*, 303 U. S. 444 (1938), becomes obsolete. In that case Lovell was arrested for distributing literature without a permit. This Court reversed and found the ordinance unconstitutional. Under the theory of the court below, this Court should not have decided the constitutional question, since Lovell might have been issued a permit had she applied. Under the same theory, newspapers could be required to submit their copy in advance, and unless and until the censors rejected the paper, no one could complain. Carried to the *reductio ad absurdum*, the city could impose a restriction that no one could exhibit a motion picture in Chicago unless the exhibitor's genealogy was approved by the city's censors. Under the theory of the court below, every exhibitor would be required to submit his genealogy and only if the city rejected one family tree, could a complaint be made. We respectfully submit that this is not the law nor the Constitution.

In *Staub v. Baxley*, 355 U. S. 313, 319 (1958), the answer was given succinctly by this Court:

"The decisions of this Court have uniformly held that failure to apply for a license under an ordinance which on its face violates the Constitution *does not preclude review* under such an ordinance. *Smith v. Cahoon*, 283 U. S. 553, 562." [Emphasis added.]

This Court's holding in *Baxley* stresses the principle of law that there is no *need* to submit to prior censorship as a condition precedent to alleging its invalidity. The

instant case is stronger, in that Petitioner *did* apply for a permit, but refused to waive its constitutional rights in so doing. Petitioner tendered the application fee (which may be construed as a tax and perfectly proper) but would not submit the motion picture for censorship of content. If Petitioner is correct, the challenged provisions of the ordinance cannot be enforced and Petitioner is entitled to its permit.

In *Cargill v. Minnesota*, 180 U. S. 452, 468 (1901), the petitioner refused to apply for a license to operate a grain elevator. Before this Court, he argued that if he sought a license, he would be obligated to comply with various provisions of the state statute which were in violation of the United States Constitution. The Court answered that argument by saying:

"If the commission refused to grant a license, or if it sought to revoke one granted, because the applicant in the one case, or the licensee in the other, refused to comply with statutory provisions or with rules or regulations inconsistent with the Constitution of the United States, the rights of the applicant or the licensee could be protected and enforced by appropriate judicial proceedings."

We submit that Petitioner in the instant case explicitly followed the admonition of this Court in the *Cargill* case. It applied for the requisite license but refused to comply with unconstitutional provisions of the statute. When it was refused the license for this reason, it appealed to the courts for protection in "appropriate judicial proceedings."

## 2. *This Is a Manufactured, Agreed-upon Case Between the Parties.*

Nothing is further from the truth. Petitioner is in a business for profit. In the past, it has pragmatically sought to engage in the motion picture business in Chicago by

submitting its pictures for censorship. Some of the results can be found in previous litigation between the parties.

*Times Film Corporation v. City of Chicago*, 139 F. Supp. 837 (1956), 244 F. 2d 432 (C. A. 7th, 1957), rev'd *per curiam* 355 U. S. 35 (1957).

*Times Film Corporation v. City of Chicago*, U. S. District Court, Northern District of Ill., Eastern Division, 57 C 2017.

Petitioner finally determined to stand on its constitutional right to engage in its business activities without sacrificing the rights of free speech which are afforded it by the Constitution. There is no contention that Petitioner "waived" these rights by acceding to the demands of the censors in other cases, and, indeed, such a contention would be fatuous. Certainly Respondents have not cooperated with Petitioner's stand unless the threat of a fine can be viewed as cooperation. All that can be gleaned at this point is the general opinion by the court below that Petitioner has framed its case so that "the United States Supreme Court will be persuaded to rule upon the question of constitutionality of motion picture censorship \* \* \*" (R. 38). We respectfully submit that the case was brought because Petitioner earnestly contends that motion pictures must be free from previous censorship just as every other medium of communication must be free from such censorship.

### ***3. In Any Event, Neither the Question Presented Nor Plaintiff's Rights Are Substantial.***

The trial court stated that Petitioner "cannot seriously contend that prior restraint of motion pictures is, *per se*, a violation of the First and Fourteenth Amendments" [emphasis added], citing *Burstyn v. Wilson*, 343 U. S. 495

(1952), in support of its statement. We respectfully submit, and Petitioner is very serious, that this very statement by the trial court points up the importance of the federal question presented here. The *Burstyn* case, which we shall analyze below, makes the exhibition of motion pictures part of speech and of the press. The issue here then is whether Chicago has or has not the constitutional right to require the prior submission for censorship of Petitioner's motion picture before it can be shown publicly. We can think of no more important a question of federal law than here, where First Amendment rights have been interdicted. *Staub v. Baxley*, 355 U. S. 313 (1958). The number of times that this Court and other courts throughout the land have been faced with similar obstacles to the exercise of free speech heightens the importance of the question. *Burstyn, supra*, and cases following.

It is equally accepted law that there is no need for Petitioner to risk exposure to fine as provided for by the censorship ordinance for failing to obtain a permit, in order to maintain that prior censorship is invalid. This is implicit from this Court's holding *Burstyn*, where the constitutional question was heard *after* a license was applied for, granted and later withdrawn. This Court there held (at p. 499):

"As we view the case, we need consider *only* appellant's contention that the New York statute is an unconstitutional abridgement of free speech and press."  
[Emphasis added.]

The fact that there was a submission to the invalid requirement in *Burstyn* does not set that case apart from the case at hand. The revocation of a permit has the same effect as denial of a permit in the first instance, at least as far as the constitutional question is concerned. If the prior censorship requirement is unconstitutional, Petitioner is fully entitled to its permit—for which it here applied—

without such submission, and the administrative action in denying the permit is properly before the Court.

In *American Civil Liberties Union v. City of Chicago*, 3 Ill. 2d 334, 352, 121 N. E. 2d 585 (1955), plaintiffs had alleged the invalidity of the prior submission requirement in the Chicago ordinance. The highest state court there held:

"If the plaintiff, however, alleges that one or more of the conditions required for a license are invalid, he may proceed either by mandamus or by injunction. . . . Whether a complaint alleging only that a motion picture is not obscene would state a ground for equitable relief we need not decide. In the present case the plaintiffs did not so limit their complaint, for they asserted that the ordinance was invalid, and claimed the right to exhibit their film without obtaining a permit."

The court there held that the constitutional issue was properly before it, deciding that issue in favor of the prior submission requirement. (This court denied review of that decision "for want of a final judgment." 348 U. S. 979 (1955).) The court further held that each court is required to decide whether a particular picture ought, or ought not to have been proscribed. If Petitioner had here submitted to the invalid prior censorship, it would have foreclosed the constitutional issue as the trial court and appellate court would have acted as *censors de novo* pursuant to the construction which the highest state court placed on the ordinance. Such an action, however, would have required Petitioner to sacrifice the very constitutional right for which it contends.

The trial court stated that Petitioner is making a "scatter-shot" attack upon the ordinance, citing *Staub v. Baxley*, 355 U. S. 313, 318 (1958). In that case this Court sustained an attack against the ordinance in its entirety,

*reversing* the highest state court which had *declined* jurisdiction and which had stated as its reason for not deciding the First Amendment issue:

“ \* \* \* that since it ‘appears that the attack was not made against any *particular* section of the ordinance as being void or unconstitutional, and that the defendant has made no effort to comply with *any* section of the ordinance \* \* \*.’ ” [Emphasis added.]

Petitioner here is in even a better position than was the defendant in *Baxley* to raise the constitutional issue. Here Petitioner has complied with every single requirement set forth in the licensing ordinance—with the exception only of the prior submission requirement.

It was stated by the trial court, further, that Petitioner has suffered no immediate and irreparable harm. This disregards the Stipulation of Facts (R. 25-26), as well as the Answer (R. 15) whereby Respondents admit that Petitioner is directly damaged by virtue of Respondents' action in denying it a permit. Nothing is more damaging to a motion picture distributor than not being able to distribute its motion pictures. The value of speech is in its timely delivery.

The trial court stated that it was “hypothetical” as to whether the penalties provided for under the ordinance for exhibiting a film without a permit would be applied to Petitioner. This statement, again, contradicts the Stipulation of Facts (R. 25-26) as well as Respondents' own Answer (R. 15) whereby it is made clear beyond a doubt that the sanctions provided for in the ordinance would be brought to bear against Petitioner if Petitioner exhibited its motion pictures without a permit.

We respectfully submit that a justiciable controversy has been set forth in the case. The single issue of law presented here is whether or not Chicago can require prior censorship of motion pictures.



**II. THOSE SECTIONS OF THE CHICAGO ORDINANCE WHICH REQUIRE SUBMISSION OF MOTION PICTURES FOR CENSORSHIP PRIOR TO PUBLIC EXHIBITION ARE VOID AS A PRIOR RESTRAINT ON FREEDOM OF SPEECH AND OF THE PRESS.**

**1. *Motion Pictures Are Part of Speech and of the Press and Cannot Be Censored in Advance of Public Exhibition.***

The dissemination of ideas by motion pictures has in recent decades become one of our accepted modes of speech and press. Among a great many factors contributing to the success story of the motion pictures as a mode of speech are scientific inventions and improvements which have made it possible to faithfully record and transmit ideas by this medium of expression. It was logical, therefore, for the courts to include motion pictures within the protective orbit of the First Amendment.

Full expression of the concept that the motion picture is a form of speech protected by the Constitution may be found in *Burstyn, Inc. v. Wilson*, 343 U. S. 495, 502 (1952), and in *Kingsley International Pictures Corp. v. Regents of the University of the State of New York*, 360 U. S. 684 (1959).

In *Burstyn* the Court held as follows:

"For the foregoing reasons, we conclude that expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments. \* \* \* The statute involved here does not seek to punish, as a past offense, speech or writing falling within the permissible scope of subsequent punishment. On the contrary, New York requires that permission to communicate ideas be obtained in advance from state officials who judge the content of the words and pictures sought to be communicated. This Court recognized many years ago, that such a previous restraint is a form of infringe-



ment of freedom of expression to be especially condemned. *Near v. Minnesota*, 283 U. S. 697 (1931).” [Emphasis added.]<sup>1</sup>

The Court, in *Burstyn*, was specifically concerned with the guide pursuant to which New York banned motion pictures which the censor considered sacrilegious. In the cases subsequent to *Burstyn*, the Court has either struck down the criterion before the Court under which censorship had been imposed on the exhibition of motion pictures or has found the motion picture not proscribed by such criterion.

*Gelling v. Texas*, 343 U. S. 960 (1952).

*Commercial Pictures Corporation v. Regents of the University of New York*, 346 U. S. 587 (1954).

*Superior Pictures, Inc. v. Department of Education*, 346 U. S. 587 (1954).

*Holmby v. Vaughn*, 350 U. S. 870 (1955).

*Times Film Corporation v. City of Chicago*, 355 U. S. 35 (1957).

In *Kingsley International Pictures Corp. v. Regents of the University of the State of New York*, 360 U. S. 684, 688 (1959), the Court again emphasized that the basic prin-

1. Virtually every medium of communication has at one time or other been the subject of the censor's attack. This Court has persistently repelled these efforts:

NEWSPAPERS: *Near v. Minnesota*, 283 U. S. 697 (1931); *Grosjean v. American Press Company, Inc.*, 297 U. S. 233 (1936); BOOKS AND MAGAZINES: *Winters v. New York*, 333 U. S. 507 (1948); *Hannigan v. Esquire Inc.*, 327 U. S. 146 (1946); PAMPHLETS AND HANDBILLS: *Lovell v. City of Griffin*, 303 U. S. 444 (1938); *Murdock v. Pennsylvania*, 319 U. S. 105 (1943); *Schneider v. State*, 308 U. S. 147 (1939); TELEVISION: *Dumont Laboratories v. Carroll*, 184 F. 2d 153 (C. A. 3d, 1950); cert. den. 340 U. S. 929 (1951); SPEECH ON THE PUBLIC STREETS AND PARKS: *Cantwell v. Connecticut*, 310 U. S. 296 (1940); *Kunz v. New York*, 340 U. S. 290 (1951); *Niemotko v. Maryland*, 340 U. S. 268 (1951); *Hague v. C. I. O.*, 307 U. S. 496 (1939).

ciple of law which protects speech from state invasion applies to motion pictures:

"What New York has done, therefore, is to prevent the exhibition of a motion picture because that picture advocates an idea. \* \* \* Yet the First Amendment's basic guarantee is of freedom to advocate ideas. The State, quite simply, has thus struck at the very heart of constitutionally protected liberty."

Since this Court was not required, in *Burstyn*, nor in any of the other cases subsequent to it, to base its holding on the validity *per se* of a requirement of prior submission of a motion picture to a Board of Censors, an important question of federal law involving First Amendment rights is now beclouded. In the progeny of litigation following the *Burstyn* case, lower courts have interpreted that holding to mean a great variety of things. Massachusetts' highest court held that no prior censorship is valid. *Brattle Films v. Commissioner of Public Safety*, 127 N. E. 2d 891 (Mass., 1955). Other lower courts have voided censorship of motion pictures on the ground that the enabling act was not tightly drawn. *Hallmark Productions v. Carroll*, 121 A. 2d 584 (Pa. 1956). In *RKO v. Department of Education*, 122 N. E. 2d 769 (Ohio, 1953), the Ohio court held that this Court's decision in *Superior Pictures, Inc. v. Department of Education*, 346 U. S. 587 (1954), meant that every order whereby a censor banned a motion picture was unreasonable and arbitrary, although it held further that this Court did not, in the *Superior* case, void Ohio's enabling act. Most lower courts, however, have limited their holdings to a determination whether or not the enabling statute setting up censorship of motion pictures was more, or less, tightly drawn than those standards which this Court voided in the *Burstyn* case and in the subsequent cases.

In the Illinois Supreme Court, the view was expressed that the "precise scope [of the *Burstyn* holding] is not

easy to determine." Yet it was concluded by that court that censorship was proper if the ordinance was so construed as to exclude the showing of "obscene" motion pictures. *American Civil Liberties Union v. City of Chicago*, 3 Ill. 2d 334, 342, 121 N. E. 2d 585 (1955). That court stated, further, that this Court's holding in *Burstyn* did not completely "immunize" motion pictures from censorship under the Chicago ordinance as construed by that court, so long as there was full judicial review of the censor's action. It is this question which is squarely before the Court.

The effect of the state court's holding in the *American Civil Liberties Union* case is not only that every court of review becomes a court of censors, but, in addition, each court might be required to determine *on more than one occasion* whether the identical motion picture had received due process under different standards.

If the state court's view in so interpreting this Court's holding in *Burstyn* is correct, then eventually this Court as well as the lower courts, may be required to see the identical motion picture on numerous occasions to determine in each instance whether a different standard gave due process. Ultimately, the censor could perpetually exclude a motion picture by application of semantics—proscribing under standard 2 the same motion picture which had been viewed under standard 1, and so forth *ad infinitum*.

Indeed, this is exactly what happened in the *American Civil Liberties Union* case. The case involved the motion picture entitled *The Miracle*—the very picture involved in the *Burstyn* case. Following the *Burstyn* case, the Chicago censors concluded that *The Miracle* was obscene and banned it. The trial court reversed the censors. The Illinois Supreme Court then construed the ordinance and reversed

and remanded for further proceedings. 3 Ill. 2d 334, 121 N. E. 2d 585 (1955). This Court refused to review the case for want of a final judgment. 348 U. S. 979 (1955). The case thereupon went back to the trial court and on this second go-around, the trial court (with a different judge) found the motion picture obscene and upheld the censors. The Illinois Appellate Court thereupon reversed the second trial court and found the picture not obscene. 13 Ill. App. 2d 278 (1957). At this point, the city apparently tired of the controversy and issued a permit, but *The Miracle* was never publicly exhibited in Chicago. Some five years elapsed between the original action of the Censor Board until the permit was finally ordered issued.

Previous litigation between these same parties further illustrates the point. One of the motion pictures involved was entitled *Game of Love*. The censors banned it as obscene. Suit was filed in federal court and was referred to a Master in Chancery. He took extensive testimony and found the picture not obscene. On objections to the District Court, the trial judge impaneled a jury advisory in nature (since it was an equity case) who were told to view the movie and determine whether or not it was obscene. There was no *voir dire* and no instructions were given the jurors. They voted 11 to 1 that the motion picture was obscene. The trial judge agreed with them and reversed the Master's findings. *Times Film Corporation v. City of Chicago*, 139 F. Supp. 837 (1956). The Court of Appeals for the Seventh Circuit upheld the trial court. 244 F. 2d 432 (C. A. 7th, 1957). This Court reversed, *per curiam*, citing *Burstyn*, 355 U. S. 35 (1957).

We cite the above as but two examples of how the state courts' interpretation of this ordinance makes every judge an original censor, in some instances, many times over. Indeed, since the Censor Board itself claims the power to order deletions, the courts' role can be held to include this

function as well. Wholly apart from the uncomfortable role in which the courts are placed because of the curious combination of constitutional problems in a context of administrative censorship, the results under this procedure reaffirm the wisdom of the constitutional fathers when they stated that "Congress shall make no law \* \* \* abridging the freedom of speech, or of the press. \* \* \*" Their long experience with the official *imprimatur* made them painfully conscious that government officials should not decide what the people can read or say in the first instance. We submit that the stricture holds true even when judges are made a part of the process. We submit that the *Burstyn* case did not contemplate such a result.

That this Court takes no such view of its holding in the *Burstyn* case is inherent from its subsequent decisions in the motion picture field. Similarly, this Court has struck down every prior censorship requirement with regard to every other medium of expression. It follows that where, as here, the very submission requirement is challenged, this Court will set it aside as contrary to the First and Fourteenth Amendment.

## 2. *Censorship of the Ideas Communicated by Speech or the Press Has Never Been Allowed.*

The pernicious and stultifying evil of a prior discretionary license as a prerequisite for the expression of ideas has been recognized by our philosophers, our statesmen and our courts since the inception of our government. The First Amendment expresses this concern for the preservation of freedom of speech and of the press in terms of a terse, negative command. This Court has held that freedom of speech and the press is equally protected from invasion by the state, being safeguarded by the Due Process clause of the Fourteenth Amendment against such invasion.

*Gitlow v. New York*, 268 U. S. 652 (1925) and cases following. This principle of constitutional law is set forth in the landmark case of *Near v. Minnesota*, 283 U. S. 697, 713 (1931) where the Court, in striking down a prior censorship scheme imposed by a state, held: .

"The question is whether a statute authorizing such proceedings in restraint of publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed. In determining the extent of the constitutional protection, *it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication.* . . . The liberty deemed to be established was thus described by Blackstone: 'The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censors for criminal matter when published'." (Emphasis added.)

Following the decision in *Near*, this Court has consistently struck down any and all censorship attempts made in violation of the *Near* holding. Today, there can be no question but that the general constitutional yardstick set forth in *Near* applies equally where the speech takes the form of motion pictures, even as a business enterprise. In *Smith v. California*, 361 U. S. 147, 152 (1960), this Court made this clear beyond doubt, when it held, in citing the *Near* case:

"It is too familiar for citation that such has been the doctrine of this Court, in respect of these freedoms ever since [*Near*]. And it also requires no elaboration that the free publication and dissemination of books and other forms of the printed word furnish very familiar application of these constitutionally protected freedoms. It is of course no matter that the dissemination takes place under commercial auspices. See *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495; *Grosjean v. American Press Co.*, 297 U. S. 233."



Among the statutes voided by this Court under the First and Fourteenth Amendments as invalid prior censorship schemes are those which imposed restraints by their *terms*, as well as those which had the *effect* of inhibiting speech. The Chicago ordinance by its terms falls in the class of enactments which impose an invalid restraint by its terms.

In *Lovell v. City of Griffin*, 303 U. S. 444, 451 (1938), an ordinance proscribed the distributing of handbills without a prior permit from an administrative official. The Court emphasized the general rule applied, stating:

"The ordinance is not limited to 'literature' that is obscene or offensive to public morals or that advocates unlawful conduct. \* \* \* The ordinance embraces 'literature' in the widest sense."

Compare the terms of that ordinance to those of the Chicago ordinance, which embraces motion pictures in their widest sense. This Court in *Lovell*, held further:

"We think that the ordinance is invalid on its face. Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship."

Similarly, in *Cantwell v. Connecticut*, 310 U. S. 296, 305, 306 (1940), the Court voided a statute which by its terms prohibited the solicitation of moneys for religious causes without prior approval in writing of an administrative official. This Court there held unanimously:

"Such a censorship \* \* \* is a denial of liberty. \* \* \* [T]o condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution."



*Smith v. California, supra*, illustrates a situation in which a statute inhibited speech, although not restraining it by its terms. The statute made it unlawful, among other things (at p. 153),

"[for] any person to have in his possession any obscene or indecent motion picture film in any place where motion pictures are sold or exhibited."

The Court added that this was an example of legislation to be doomed because it had the "collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it \* \* \*."

The Court added that:

"It has been stated here that the usual doctrines as to the separability of constitutional and unconstitutional applications of statutes may not apply where their effect is to leave standing a statute patently capable of many unconstitutional applications, threatening those who validly exercise their rights of free expression with the expense and inconvenience of criminal prosecution. *Thornhill v. Alabama*, 310 U. S. 88, 97-98."

Without in any manner diminishing the gravity of the burden the statute in *Smith* had sought to impose on freedom of speech, it is submitted that the burden imposed by Chicago's censorship requirement is even a far greater one. That burden is here compounded by the fact that we are dealing with discretionary licensing in the form of administrative censorship, as opposed to a penal statute such as was voided in *Smith*. If such burden is not tolerated in the form of a penal statute, then *a fortiori* it cannot stand when in the form of discretionary licensing as is present here.

This Court reached a similar decision in voiding the penal statute in *Thornhill v. Alabama*, 310 U. S. 88, 97 (1940), holding that:

"The power of the licensor against which John Mil-

ton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing' is pernicious not merely by reason of the censure of particular comments but by reason of the threat to censure comments on matters of public concern. *It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion.*" [Emphasis added.]

As recently as this last term, in *Talley v. California*, 362 U. S. 60, 62 (1960), this Court struck down a Los Angeles ordinance which prohibited distribution of literature which did not state the name of the author and distributor. In so doing, the Court reviewed the other handbill cases in which state and city licensing schemes have been struck down and found the Los Angeles ordinance parallel since

"such an identification requirement would tend to restrict freedom of distributable information and thereby freedom of expression."

Thus it is clear that this Court has voided even those enactments which had the collateral effect of inhibiting free speech and press, although not requiring submission for censorship of content to an administrative official. Where the speech is inhibited, as here, by the requirement of prior submission, it is plain that such a requirement is absolutely void.

What is the effect on a distributor of motion pictures who reviews the case history of *The Miracle* or of *The Game of Love*? We submit that the censor's threat is pervasive and consistent. It does not require a crystal ball to suspect that many distributors may well by-pass Chicago rather than run the gamut of the Censor Board and the courts of review.

It is true that this Court has at times upheld "licensing", as in *Cox v. New Hampshire*, 312 U. S. 569 (1941);

*Poulos v. New Hampshire*, 345 U. S. 395 (1953), or as in *Kovacs v. Cooper*, 336 U. S. 77 (1949). Indeed, licensing, *per se*, is not challenged by Petitioner in the instant case. We readily concede that if the Chicago ordinance is viewed solely as a tax measure or as a safety measure to guard against fires, no First or Fourteenth Amendment problems arise. But such licensing schemes as were upheld in the line of cases cited above or as would remain in the instant ordinance if the prior submission requirements were declared void rest upon a wholly different premise. In each of the above instances, there was a reasonable regulation as to the time, place or manner of the dissemination of speech.

In none of the statutes where licensing was upheld did an administrator have control over the *content* of the speech. Ministerial licensing, as distinguished from discretionary censorship, was described as follows in *Niemotke v. Maryland*, 340 U. S. 268, 282 (1951), in the concurring opinion of Mr. Justice Frankfurter:

"A licensing standard which gives an official authority to censor the content of a speech differs *toto coelo* from one limited by its terms, or by nondiscriminatory practice, to considerations of public safety and the like. Again, a sanction applied after the event assures consideration of the particular circumstances of a situation. The net of control must not be cast too broadly."

We recognize that it is tempting for a community to use the more efficient and certain means of censorship to protect against the social evils that supposedly exist in the content of a communication. Thus the court below answered Petitioner's contention that the city's power was limited to punishment after the fact by stating (R. 14):

"If that contention is correct, thus barring censorship before a film is exhibited in public theatres, actual prior restraint will scarcely exist as to the ex-

hibition of a film in theatres. While it is common knowledge that the responsible owners of newspapers and television broadcasting systems respectively exercise a wholesome, voluntary censorship over newspapers and television, no similar regulation of the exhibition of moving picture films in theaters is as effectively exercised by private industry. The arrest and prosecution of employees of theaters who exhibit films charged with obscenity, inciting to riot, and the other proscriptions mentioned in the ordinance under consideration, is at most a theoretical remedy of prevention."

The same point was made by the state court in the *Near* case when it stated that prosecutions to enforce penal statutes for libel did not result in "efficient repression or suppression of the evils of scandal." *Near v. Minnesota*, 283 U. S. 697, 711, 722 (1931). The Court answered that defense by stating:

"There is nothing new in the fact that charges of reprehensible conduct may create resentment and the disposition to resort to violent means of redress, but this well-understood tendency did not alter the determination to protect the press against censorship and restraint upon publication."

Even the dissent in *Near* by Mr. Justice Butler agreed that this temptation for "efficient" licensing system must be resisted. The dissent there argued that the Minnesota statute was not a prior restraint in that there had been previous publication without any submission or restriction. We submit that it is fair to say that under the reasoning of both the majority and the dissent in the *Near* case, the Chicago ordinance would fall insofar as it requires prior submission of *all* motion pictures for censorship of content.

What has been said in the *Near* case about newspapers must apply to motion pictures. However great the temp-

tation to rely on censors to say what is good for our morality, the effects of yielding to such temptations are disastrous.

What is the social danger that the Chicago ordinance seeks to prevent? Are Chicagoans more susceptible to immorality than Washingtonians or San Franciscoans? Are the censors aware of what the social dangers are against which they are protecting? The ordinance and Respondents are silent.

The record in one of the previous cases involving these parties reveals some curious answers on the part of the administrative officials. The record was before this Court in *Times Film v. City of Chicago*, 355 U. S. 35 (1957), and the references in this paragraph are to that record (GR). Thus the Commissioner of Police stated that the film *Game of Love* was obscene because it aroused in him a desire to be with his wife (GR. 564). Is this the evil that Chicago censors are fighting? One of the censors stated that her job was to protect the weakest member of society (GR. 142). Is this the standard of film fare which distributors can constitutionally exhibit? Is this the maximum allowable to Chicago movie-goers? Another censor stated that she called them as she saw them (GR. 193). Is this the final result of the judicial tumult as to the definition of obscenity and the preciseness of standards to be applied? Another censor said her job was to see that Chicagoans get "educational entertainment" (GR. 145). The Illinois Supreme Court defined obscenity (in part) as matter which tended to arouse the sexual desires of an average normal person. All of the censors denied that their sexual desires were aroused by *Game of Love*. Did this mean that they ignored the standard or does it reflect on their capacity to censor?

We cite the above as examples not of the particular quality of Chicago censorship but rather of the practical

basis on which the restrictions against prior restraint rest. We think that record stands as an indictment of all prior censorship everywhere. We submit that the questions answered by the censors are best answered by the movie-going public. In most such questions, the state can have no interest. Where its interest does appear, it has the means for protection.

The states must rely on their traditional powers of punishing for transgression *after* the transgression. In Illinois this takes the form of a criminal statute prohibiting the exhibition of pornography. Ill. Rev. Stat. (1959), c. 38, § 470. That remedy has far different effects than the ordinance in question. First, it does not interfere with the initial communication. Second, if the governmental authorities determine that the communication *does* trespass on vital community interests, the prosecuting attorney must persuade a grand jury, a petit jury and a judge of that fact, with all the traditional and procedural safeguards of our criminal law placed around the defendant. It is no doubt true that there are few convictions. We submit that this was the result contemplated by the Constitution. Doubts are to be resolved in favor of the communication and the very "inefficiency" of the criminal law remedies are the protection against unwarranted interference with speech. We think that Mr. Justice Douglas summed up this proposition in his concurring opinion in *Kingsley International Pictures Corp. v. Regents of the University of the State of New York*, 360 U. S. 684, 697 (1958), when he stated:

"\* \* \* censorship of movies is unconstitutional, since it is a form of 'previous restraint' that is as much at war with the First Amendment, made applicable to the States through the Fourteenth as the censorship struck down in *Near v. Minnesota*, 283 U. S. 697. If a particular movie violates a valid law, the exhibitor can be prosecuted in the usual way. *I can find in the*



*First Amendment no room for any censor whether he is scanning an editorial, reading a news broadcast, editing a novel or a play or previewing a movie."*

3. *The Exhibition of Motion Pictures Presents No Such Exceptional Problems as Would Justify Prior Censorship.*

The court below listed a number of allegedly undesirable matters which Petitioner's motion picture might portray (R. 39).

"Among these undesirable matters, the lower court lists the following: It might be a *portrayal* of a school of crime which, for instance, teaches the steps to be taken and successfully carried out in the assassination of a President of the United States as he leaves the White House, or *shows* how to arrange an uprising of subversive groups in one of our cities." [Emphasis added.]

This was an obvious attempt to equate the exhibition of motion pictures with these rare exceptional circumstances in which interference with speech had been allowed.

This Court in *Near, supra*, indicated that some restraints may be validly imposed. The Court there emphasized, however, that such restraint may only be applied in the most exceptional cases. These exceptions to the rule against restraint of press and publications have been allowed only in those rare instances where the expression is the obvious and demonstrable cause of some imminent and substantive evil to the State. It is patently absurd to contend that a whole mode of communication such as the motion picture creates an evil so overwhelming as to justify discretionary licensing.

This Court has made it quite clear that mere apprehension of a danger or fear does not justify suppression of speech. It is, therefore, not sufficient merely to state,



as does the lower court, the possibility of such a danger. A substantive evil must be shown to exist, its imminence must be apparent, and its gravity must be serious. In *Schenck v. United States*, 249 U. S. 47, 52 (1919), the Court stated this as follows:

"The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

In *Dennis v. United States*, 341 U. S. 494 (1951), and in *Yates v. United States*, 354 U. S. 298 (1957), the Court was principally concerned with the degree and burden of proof and the showing of proximity of result which the government was required to sustain in order to meet the constitutional requisite for convictions where speech was restrained. These requirements included the need to satisfy the trial court and the jury and every appellate court that the defendants "intended to overthrow the Government 'as speedily as circumstances would permit'"; that "the requisite danger existed"; and, that "the gravity of the 'evil', discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." 341 U.S. 494, 509-10.

From all these questions it is clear that restraint of speech is justified only if it is plain that it is the imminence of some breach of the public order that gives rise to the penalty, and not the views expressed or the content of the speech. In addition, there must be substantial affirmative proof of the presence or imminence of a substantive evil directly resulting from the words being published.

The face of the Chicago ordinance here in question is defeating on both these constitutionally required requisites. Pursuant to the terms of the ordinance, the penalty is

imposed exclusively for showing a motion picture without a permit. The ordinance proscribes all motion pictures, and by its terms there need be no showing of any evil directly resulting from the exhibition of the motion picture. If the failure to meet the constitutional requisites could bar subsequent punishment, as was said in *Dennis* and *Yates*, then *a fortiori* their disregard must void the prior censorship scheme here present.

The Court has said that the basis for the exception to free speech must be clear and convincing. The Chicago ordinance puts the shoe on the other foot, giving literal interpretation to Holmes' statement that "Every idea is an incitement." *Gillow v. New York*, 268 U. S. 652, 673 (1925). There, every motion picture is *presumed* to be clearly and presently dangerous unless the censors are satisfied that it is not. Even the court below anticipates that the motion picture involved is obscene, stating (R. 40):

"Although plaintiff, evidently for strategic purposes, refuses to take a stand which will reveal the contents of the film, certain arguments in its brief point strongly to the fact that the film is one subject to a charge of obscenity."

We see no reason why the city should be indulged in a presumption that because a communication is contained on celluloid, it is suspect and excludable until the city is satisfied that it is a fit communication.

The lower court lists a number of allegedly undesirable matters which might be depicted by petitioner's motion picture (R. 39). Among these, the lower court includes *inter alia*: "(a) An immoral or obscene act; (b) Exposure of the citizens of any race, creed or religion to contempt, derision, or obloquy by attributing to them depravity, criminality or lack of virtue; and, (c) Acts tending to produce a breach of peace or riots" (R. 41).

A review of the cases in this Court which have considered the limits of community control of speech make it clear that under certain circumstances, the speaker's message may be punished if it contains any of the ingredients as alleged by the court below. This Court has held that obscenity, libelous statements, and incitements to riot do not enjoy the protective scope of the First Amendment. *Alberts v. California*, 354 U. S. 476 (1957) (obscene speech); *Beauharnais v. Illinois*, 343 U. S. 250 (1952) (libelous statements); *Chaplinsky v. New Hampshire*, 315 U. S. 568 (1942). But these cases make it equally clear that the limits of the community control are to restrain the message *after* it has reached the public forum.

In *Alberts*, the statute was aimed at punishing obscene speech. It was in the form of a penal law, with all its attendant judicial safeguards. None of these judicial safeguards are present in the ordinance before the Court. In *Alberts*, even with the presence of these judicial safeguards in a subsequent punishment statute, the Court emphasized that there had to be a carefully worded charge to a jury before a conviction could be sustained.

We in no way *concede*, of course, that the presence of these judicial safeguards, no matter how important their presence, could save the Chicago ordinance. The core of the Chicago ordinance is that it prevents speech in the form of motion pictures to reach the public forum. The statute upheld in *Alberts* does not so prevent the message from reaching the community. The message there is restrained only *after* it is disseminated.

The criminal libel statute sustained by this Court in *Beauharnais* is another illustration of permissible community control. Once again the difference in both aim and effect between the statute there sustained on the one hand, and the Chicago censorship ordinance on the other, is read-

ily apparent. The Illinois criminal libel statute was aimed at preventing breeches of the peace. The Chicago censorship ordinance is aimed merely at preventing the showing of motion pictures without a permit. In the case of the Chicago censorship ordinance, the net effect is to interdict the exhibition of all motion pictures. Not so in the *Beauharnais*-type law, which does not impose any previous restraint whatever. In addition, a conviction under *Beauharnais* is *not* for the speech itself, but rather for the effect of the speech in terms of imminent action.

The limits of permissible community control, if a motion picture is a picture of "acts tending to produce a breach of the peace or riots" (R: 39), are indicated by the type of statute upheld by this Court in *Chaplinsky*. The statute provided that "no person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street \* \* \* *with intent* to deride, offend or annoy him \* \* \* " [emphasis supplied]. 315 U. S. 568, 569 (1942). Again, this type of statute imposes a completely different type of restraint than does Chicago by its prior submission requirement. In *Chaplinsky*, no one stopped defendant from delivering his message. No one censored his speech. Furthermore, the record in that case makes it crystal clear that he was requested to discontinue speaking because of the extreme likelihood that his speech would lead to a breach of the peace and that such breach of the peace was indeed imminent.

The above cases show that, even where subsequent punishment is concerned, this Court has required the presence of elements which Chicago has not even alleged to exist, and which Chicago could not allege until such time as Petitioner's motion picture has been publicly shown.

Once again, however, we are met with the argument of convenience and efficiency. Thus the lower court opines

that the judicial process is an insufficient remedy to cope with the exhibition of motion pictures, stating:

"A film which incites a riot produces that result almost immediately after it is shown publicly. Likewise, the effect upon the prurient mind of an obscene film may result harmfully to some third person within hours after the film has been shown." (R. 42.)

If the lower court thereby suggests that the motion picture is a more effective medium for the dissemination of ideas, this can hardly be a constitutional basis for applying to speech by motion pictures another rule of law as is applied to the other modes of speech. This Court held in *Kingsley International Pictures Corp. v. Regents of the University of the State of New York*, 360 U. S. 684, 688 (1959):

"... in the realm of ideas it [the First Amendment] protects expression which is eloquent no less than that which is unconvincing."

Insofar as the speed with which a harmful effect may result after viewing of a motion picture, this is a highly conjectural matter which can certainly be no constitutional basis for differentiating one medium from another. In fact, recent studies by students of human behavior patterns have borne out the impossibility of distinguishing the impact created from seeing a motion picture, from the impact left on the recipient of speech in some other form. Jahoda, *The Impact of Literature* (New York University, 1957), at p. 44. We submit that it is impossible to predict, for example, whether the impact of Petitioner's motion picture, were it to be shown by means of television in Chicago, is greater than, equivalent to, or less than the impact that would be generated by its showing in a theatre. Yet, Petitioner, is at liberty to so show its motion picture by means of television. *Dumont Laboratories v. Carroll*, 184 F. 2d 153 (C. A. 3d, 1950). No one need submit any

copy to publish or distribute *Don Juan* in book or magazine form.

The basis for the adoption of the First Amendment is illustrated by a statement made by Jefferson, "Statute for Religious Liberty," 12 Hening's Statute, Virginia, 1873, Ch. 34, p. 85:

"\* \* \* it is time enough for the rightful purposes of civil government, for its officers to interfere when principles break out into overt acts against peace and good order."

The alleged dangers which the lower court suggest as a justification for prior censorship of motion pictures exist no less in the vast majority of our states and cities where no such prior censorship of motion pictures is present. In addition to Chicago, only a handful of cities and four states (New York, Virginia, Kansas and Maryland) impose prior censorship on motion pictures, ("Entertainment: Public Pressures and the Law," 71 Harv. L. Rev. 326, 334-35 (1957)). The court may take judicial notice that the standard of morality is at least as high in the vast number of states and cities which have no motion picture censors, as it is in Chicago.

The entire basis for preventing speech is less than thin. Most motion picture censorship schemes are justified (as in this case) on the notion that a viewing of a motion picture will cause some anti-social conduct.

As an example, one of the standards prohibits obscene films. Forgetting all problems of definition, the objection to obscenity, if it is to be used to sustain an exception to freedom of speech, must be that some one viewing the obscene movie will commit some anti-social sexual act. However, Kinsey in his work *Sexual Behavior of the Human Male* (W. B. Saunders Company, 1943), stated:

"There are ever present stimuli to heterosexual re-



sponse. \* \* \* For most males whether single or married there are ever present erotic stimuli, and sexual response is regular and high."

Among young boys all sorts of "normal" stimuli evoke erotic responses. These include such things as swimming, sitting in church, sitting in warm sand, listening to the national anthem and fast elevator rides. Kinsey *ibid* pp. 164, 165. Thus even if the arousal of sexual desires can be considered undesirable (but see Judge Frank's opinion in *Roth v. Goldman*, 172 F. 2d 788, 792 (C. A. 2d, 1949)), the city cannot establish that motion pictures, or even *some* motion pictures have that effect.

The above merely points out the difficulties that the state must overcome if it is to justify even *punishment* for speech. We submit that there can be *no* justification for stopping the speech in advance of its being made. What we have said about the standard of obscenity in the Chicago ordinance applies equally to all the other standards set forth in the ordinance. Who are the great semanticists and psychologists who will determine in advance what words will create the social dangers which the state has a legitimate interest in preventing? We submit that it is neither Chicago censors nor any other pre-censorship authority.

On August 2, 1960, the Court of Common Pleas of Dolton County, Pennsylvania, declared the new Pennsylvania motion picture censorship act unconstitutional. (*Twentieth Century Fox Films Corporation v. Boehm, et al.*, No. 2887 in Equity.) The opinion of the court thoroughly reviewed the history of motion picture censorship. In commenting on the fallibility of any censorship authority, the court said as follows:

"It is fundamental that the heart of our political system is a refusal to recognize an intellectual elite with power to dictate the public taste and morality.



The people are very jealous of their basic rights, even to their elected representatives, and we believe that the general public in the exercise of discretion and with their innate sense of decency can best impose restrictions by their attendance or non-attendance at motion picture theaters as to what is right and what is morally wrong. Right or wrong, wise or unwise, the people have insisted that they be judged by their peers, that is, a cross-section of the community as distinguished from a selected, 'superior' segment of the populace."

We think that the above statement aptly describes Petitioner's point of view.

We submit that if Respondents wish to exclude unprotected speech in the form of motion pictures from Chicago, they must abide by the limits of the permissible scope of community control which this Court has imposed on states in the valid exercise of the police powers. If, therefore, Petitioner's motion picture contains any of the elements which the lower court has listed as proper for restraint (and we do not admit that the motion picture does contain any such elements), Respondents can seek to invoke the criminal process against Petitioner *after* the communication. Whatever the remedy may be, whereby Petitioner's motion picture might be lawfully restrained,

"\* \* \* it is to be closely confined as to preclude what is commonly known as licensing or censorship." *Kingsley Books v. Brown*, 354 U. S. 436, 441 (1957).

### CONCLUSION.

The lower court failed to see the substantial federal question presented by the issue of this case. It stated:

"\* \* \* the motion picture not being before the Court, no hypothesis will be assumed to apply to its *contents*."  
(R. 42.) [Emphasis added.]

We submit that no hypothesis is necessary.

The basic issue of the case is much greater in scope than the question of whether or not this particular motion picture would have been licensed, had it been submitted for previous censorship pursuant to the ordinance. This basic issue cuts at the core of the liberty of expression which the framers of the Constitution made part of that Constitution. This liberty indeed antedates the Constitution. The liberty to speak without discretionary license was in effect when James Franklin criticized the government and the grand jury refused to indict him (Duniway, *The Development of Freedom of the Press in Massachusetts*, London, 1906, pp. 97-103). The same freedom of the press was in effect when a jury acquitted John Peter Zenger for the alleged libeling of the Crown.

Thus, at the time of the enactment of the First Amendment the choice had already been made in favor of freedom of expression and against the licenser. Thus, before and after the First Amendment, all deliberate attempts to impose such prior censorship have been struck down.

Attempts at prior restraint have received their sharpest setbacks when they seek to impinge in the fields of literature or art. As was stated in *Hannegan v. Esquire*, 327 U. S. 146, 158 (1946):

"A requirement that literature or art conform to some norm prescribed by an official smacks of an ideology foreign to our system."

The late Judge Frank wrote in his concurring opinion in *United States v. Roth*, 237 F. 2d 796, 825 (C. A. 2d, 1956):

"To vest a few fallible men . . . with vast powers of literary or artistic censorship, to convert them into what J. S. Mill called a 'moral police', is to make them despotic arbiters of liberty products. If one day they ban mediocre books as obscene, another day they may do likewise to a work of genius. Originality, not too plentiful, should be cherished, not stifled."

The very court below in another case in which they reversed the Chicago censors stated (*Capitol Enterprises, Inc. v. City of Chicago*, 260 F. 2d 670, 672 (C. A. 7th, 1958)):

"Little has been authoritatively written explaining 'prior' or 'previous' restraint, instead those words are frequently found as part of an incantation used when some censorship determination is judicially annulled. Whether those words work the annulment or if annulment requires such words is difficult of discovery. But, there is a wide chasm between censoring motion pictures before deciding if they can be publicly exhibited and exhibiting a picture to the public for which criminal punishment might be imposed. In the latter situation all the familiar procedural safeguards come into play while in the other instance there are no procedural safeguards and communication is choked off at the threshold. Submission to compulsory censorship as a condition precedent to public exhibition is undoubtedly more facile unencumbered, as it is, by any procedural safeguards. Complete censorship, as we now have before us, is much like the case of obtaining indictments before a grand jury—no defense counsel is present. There, however, the analogy ends for persons accused of crime are eventually accorded some rights, but in censorship social context may be measured by six or seven persons against, as here, a society of more than approximately 3,620,962 persons, and the applicant for a permit apparently need never be heard, nor is the right to trial by petit jury available."

We respectfully submit that the choice was made by the framers of the First Amendment for liberty of expression and against previous restraints; that this choice has been upheld by this Court in every single instance where the issue has been before it; and that Chicago is bound by this choice and cannot choose ever again. The First Amendment was meant to apply to *all* media of speech. It applies to speech disseminated by motion pictures.

In the light of the above, we urge that the Court void the sections of the Chicago licensing ordinance requiring prior censorship of motion pictures as standing in the way of freedom of expression guaranteed by the First and Fourteenth Amendments. The decision of the lower court should be reversed.

Respectfully submitted,

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**APPENDIX A.****MUNICIPAL CODE OF THE CITY OF CHICAGO.****C. 155, § 155-1 to 155-7.****EXHIBITION.**

155-1. It shall be unlawful for any person to show or exhibit in a public place, or in a place where the public is admitted, anywhere in the city any picture or series of pictures of the classes or kinds commonly shown in mutoscopes, kinetoscopes, or cinematographs, and such pictures or series of pictures as are commonly shown or exhibited in so-called penny arcades, and in all other automatic or motion picture devices, whether an admission fee is charged or not, without first having secured a permit therefor from the commissioner of police.

It shall be unlawful for any person to lease or transfer, or otherwise put into circulation, any motion picture plates, films, rolls, or other like articles or apparatus, from which a series of pictures for public exhibition can be produced, to any exhibitor of motion pictures, for the purpose of exhibition within the city, without first having secured a permit therefor from the commissioner of police.

The permit herein required shall be obtained for each and every picture or series of pictures exhibited and is in addition to any license or other imposition required by law or other provisions of this code.

Any person exhibiting any picture or series of pictures without a permit having been obtained therefor shall be fined not less than fifty dollars nor more than one hundred dollars for each offense. A separate and distinct offense shall be regarded as having been committed for each day's

exhibition of each picture or series of pictures without a permit. [Amend. Coun. J. 12-21-39, p. 1396.]

155-2. Before any such permit is granted, an application in writing shall be made therefor, and the plates, films, rolls, or other like apparatus by or from which such picture or series of pictures are shown or produced, or the picture or series of pictures itself as shown or exhibited, shall be shown to the commissioner of police, who shall inspect such plates, films, rolls, or apparatus, or such picture or series of pictures, or cause them to be inspected, and within three days after such inspection he shall either grant or deny the permit. In case a permit is granted, it shall be in writing and in such form as the commissioner of police may prescribe.

155-3. The fee for the original permit in each case shall be three dollars for each one thousand lineal feet of film or fraction thereof, and for each duplicate or print thereof an additional fee of one dollar for each one thousand lineal feet of film or fraction thereof, which fee shall be paid to the city collector before any permit is issued.

155-4. Such permit shall be granted only after the motion picture film for which said permit is requested has been produced at the office of the commissioner of police for examination or censorship.

If a picture or series of pictures, for the showing or exhibition of which an application for a permit is made, is immoral or obscene, or portrays depravity, criminality, or lack of virtue of a class of citizens of any race, color, creed, or religion and exposes them to contempt, derision, or obloquy, or tends to produce a breach of the peace or riots, or purports to represent any hanging, lynching, or burning of a human being, it shall be the duty of the commissioner of police to refuse such permit; otherwise it shall be his duty to grant such permit.

In case the commissioner of police shall refuse to grant a permit as hereinbefore provided, the applicant for the same may appeal to the mayor. Such appeal shall be presented in the same manner as the original application to the commissioner of police. The action of the mayor on any application for a permit shall be final.

155-5. In all cases where a permit for the exhibition of a picture or series of pictures has been refused under the provisions of the preceding section because the same tends towards creating a harmful impression on the minds of children, where such tendency as to the minds of adults would not exist if exhibited only to persons of mature age, the commissioner of police may grant a special permit limiting the exhibition of such picture or series of pictures to persons over the age of twenty-one years; provided, such picture or pictures are not of such character as to tend to create contempt or hatred for any class of law abiding citizens.

When such special permit has been issued, it shall be unlawful for any person exhibiting said picture to allow any persons under the age of twenty-one years to enter the place where same is being exhibited or to remain in said place while any part of said picture or series of pictures is being shown.

Any person violating any of the provisions of this section shall be fined not less than ten dollars nor more than twenty-five dollars for each offense, and the admission of each person under twenty-one years of age, or permission to remain or such person under twenty-one years of age, shall constitute a distinct and separate offense.

155-6. The written permit provided for in this chapter shall be posted at or near the entrance of the theater, hall, room, or place where any permitted picture or series of pictures is being exhibited, at such a place and in such a position that it may easily be read by any person entering



such theater, hall, room, or place at any time when any such permitted picture or series of pictures is being exhibited whether in the day time or in the night time.

155-7. When a permit to show a picture or series of pictures is once granted to an exhibitor, the picture or series of pictures may be shown by any other exhibitor, provided, that the written permit is actually delivered to such other exhibitor and that a written notice of the transfer or lease to such other exhibitor is first duly mailed by the transferee or lessee to the commissioner of police. Any number of transfers or leases of the same picture or series of pictures may be made, provided always, that the permit is actually delivered to the transferee or lessee and that such written notice be first mailed to the commissioner of police.

Said written notice shall contain the name and a brief description of the picture or series of pictures, the number of the permit, and the location of the building or place where the transferee or lessee proposes to exhibit such picture or series of pictures. The exhibition by any transferee or lessee of any permitted picture or series of pictures without first mailing such notice shall be considered a violation of this chapter, and a separate offense shall be regarded as having been committed for each day's exhibition by a transferee or lessee of each picture or series of pictures without the mailing of such notice.

In case a permit shall be refused for any such motion picture plates, films, rolls, or other like articles or apparatus from which a series of pictures for public exhibition can be produced, it shall be unlawful for any person to lease or transfer the same to any exhibitor of motion pictures or otherwise put the same into circulation for purposes of exhibition within the city.

**CONSTITUTION OF THE UNITED STATES  
FIRST AND FOURTEENTH AMENDMENTS.**

**AMENDMENT I.**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

**AMENDMENT XIV.**

**SECTION 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1960.

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**No. 34**

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**TIMES FILM CORPORATION**, A NEW YORK CORPORATION,  
*Petitioner,*

*vs.*

**THE CITY OF CHICAGO**, A MUNICIPAL CORPORATION,  
**RICHARD J. DALEY AND TIMOTHY J. O'CONNOR**,  
*Respondents.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT.

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**BRIEF FOR RESPONDENTS.**

---

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## INDEX.

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	PAGE
Opinions below .....	1
Jurisdiction .....	1
Question presented .....	1
Statement .....	1
Summary of argument.....	1
Argument .....	3
I. No justiciable controversy nor substantial federal question .....	3
II. Ordinance requiring advance showing of motion pictures prior to public exhibition not violative of constitutional safeguards prohibiting restraints on Freedom of Speech and of the Press .....	4
Conclusion .....	10

CITATIONS.

American Civil Liberties Union v. City of Chicago, 3 Ill. 2d 334, 121 N. E. 2d 585; 13 Ill. App. 2d 278, 141 N. E. 2d 56.....	4, 5
Alberts v. California, 354 U. S. 476.....	9
Beauharnais v. Illinois, 343 U. S. 250, 255, 256.....	8
Block v. City of Chicago, 239 Ill. 251, 87 N. E. 1011..	4
Burstyn v. Wilson, 343 U. S. 495, 505, 506.....	5, 6, 7
Cantwell v. Connecticut, 310 U. S. 296, 308.....	8
Chaplinsky v. New Hampshire, 315 U. S. 568, 571, 572	8
Commercial Pictures Corp. v. Regents, 346 U. S. 587..	6
Gelling v. Texas, 343 U. S. 960.....	6
Kingsley Books, Inc. v. Brown, 354 U. S. 436, 441- 444 .....	10, 11
Kingsley Pictures Corp. v. Regents, 360 U. S. 684, 689, 690 .....	6, 9
Kovacs v. Cooper, 336 U. S. 77, 83.....	8
Near v. Minnesota, 283 U. S. 697, 716.....	6, 8, 10
Roth v. United States, 354 U. S. 476.....	9
Smith v. Cahoon, 283 U. S. 553, 562.....	3
Staub v. City of Baxley, 355 U. S. 313.....	3
Superior Films, Inc. v. Dept. of Education, 346 U. S. 587 .....	6
United Artists Corp. v. Thompson, 339 Ill. 595, 171 N. E. 742 .....	4
Whitney v. California, 274 U. S. 357, 373.....	7

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
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---

**BRIEF FOR RESPONDENTS.**

---

**Preliminary.**

We accept petitioner's summarization of the opinions below, the jurisdiction, the question presented, the statutes involved, and the statement. There is no area of disagreement in these matters and therefore it is unnecessary to repeat them.

**SUMMARY OF ARGUMENT.**

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**I.**

Petitioner is attempting to compel an abstract opinion from this Court ruling on the validity of a municipal ordinance. There is no substantial federal question as peti-

tioner failed to make proper application for a permit which may well have been issued if petitioner had complied with the provisions of the ordinance. There is no justiciable controversy nor any real constitutional question. It is fundamental that this Court will not review a case merely to decide moot or abstract questions, to establish a precedent, or to render a judgment to guide potential future litigation.

## II.

Free speech is not absolute and is subject to some restriction. Matters dealing with obscenity and those tending to lead to riots or breaches of the peace have never been regarded as within the protective areas of constitutional guarantees against abridgment of free speech. These well-defined and narrowly limited classes of speech constitute exceptions to the general rule.

The several states and the municipalities may prohibit acts or things reasonably thought to bring evil or harm to its people. Obscene motion pictures publicly exhibited to children, the impressionable, and the weak minded of our society, cannot be tolerated. Where the obscene feature overcomes the artistic merit, and where it leads to prurient, lustful desires, then the municipality is duty-bound to protect its people from the dire consequences of such aroused desires.

The controls which a state may exercise over motion pictures is not the same as those allowable for newspapers and the like. Obscenity is not protected by the Constitution and we are convinced that the judiciary will not limit the local authorities in resorting to whatever means legally available to protect its people against the public exhibition of obscene films. Nor is it conceivable that the courts will permit free speech which leads to riots or breaches of the peace.



## ARGUMENT.

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### I.

**There is no justiciable controversy nor a substantial federal question.**

The trial court and the United States Court of Appeals for the Seventh Circuit were both of the opinion that this case does not involve a justiciable controversy nor a substantial federal question (R. 27-30; 37-42). We are firmly convinced that this is true.

The court below stated (R. 38): "• • • plaintiff has limited its statement of the facts in an obvious attempt to so frame its case that" this Court will be prevailed upon to rule on the constitutional question. This Court has steadfastly adhered to the rule that where an ordinance requires the issuance of a permit as a condition precedent to the carrying on of a business, one who is within the terms of the ordinance, but who has failed to make the required application, is not at liberty to complain because of his anticipation of improper or invalid action in administration. *Smith v. Cahoon* (1931), 283 U. S. 553, 562; *Staub v. City of Baxley* (1958), 355 U. S. 313. However, in both the *Smith* and *Staub* cases, this Court recognized that this principal was inapplicable in criminal proceedings where the defendant had been subjected to arrest and was being prosecuted under such a law. This Court then held that any defense could be asserted in such proceedings. This is not the situation here. This is a civil proceeding, initiated by petitioner, seeking to compel the issuance of a permit. Petitioner has no standing in Court on constitutional grounds when it failed to make proper application for a permit.

## II.

**The Chicago Ordinance requiring advance showing of motion pictures prior to public exhibition is not violative of constitutional safeguards prohibiting restraints on Freedom of Speech and of the Press.**

Petitioner attacks the validity of a Chicago ordinance which provides for public exhibition of motion pictures within the City. Under the terms of the ordinance, it is the duty of the appropriate municipal official to issue a permit for exhibition of a film unless he finds that the film is:

1. Obscene;
2. Immoral;
3. Portrays depravity, criminality, or lack of virtue of a class of citizens of any race, color, creed, or religion and exposes them to contempt, derision, or obloquy;
4. Tends to produce a breach of the peace or riots;
5. Purports to represent any hanging, lynching, or burning of a human being.

Petitioner refused to submit its film for examination. Having no knowledge of its contents, it necessarily follows that the motion picture meets every ground for rejection. Assuming, *arguendo*, that the picture, "Don Juan," is obscene, immoral, that it tends to produce a breach of the peace and riots, and that it violates all other provisions of the ordinance, we come to the basic question—does a municipality have such a right?

Illinois courts have consistently upheld the constitutionality of this very ordinance. *Block v. City of Chicago* (1909), 239 Ill. 251; 87 N. E. 1011; *United Artists Corp. v. Thompson* (1930), 339 Ill. 595, 171 N. E. 742; *American Civil Liberties Union v. City of Chicago* (1955), 3 Ill. 2d

334, 121 N. E. 2d 585. The findings of the Illinois courts are binding on the Federal Courts except in the limited area urged here, that is, whether or not the ordinance violates Freedoms of Speech and of the Press guaranteed under the First and Fourteenth Amendments.

For more than 50 years Chicago's censorship ordinance has been administered fairly and impartially without much criticism from the exhibitors. The standards therein set forth have been clearly understood and strictly adhered to by both the City's officials and the exhibitors. Rarely did the exhibitors find reason to criticize the decision of the City's Censorship Board. In those instances where disagreement did arise, the exhibitors found an adequate legal remedy in the state courts (*American Civil Liberties Union v. City of Chicago* (1955), 3 Ill. 2d 334, 121 N. E. 2d 585; *American Civil Liberties Union v. City of Chicago*, 13 Ill. App. 2d 278; 141 N. E. 2d 56). Until recent years, the exhibitors and the City's Censorship Board have lived in peaceful coexistence. It was not until recently, when the exhibitors, sensing a lowering of moral standards especially among the teenagers, began to produce "border line" motion pictures primarily based on sex and which, in the opinion of the City's Censorship Board tended to arouse the prurient interest, that the City's Censorship Board exercised its power of prior restraint. The result has been an avalanche of lawsuits testing the constitutionality of the City's Censorship Ordinance.

Petitioner contends that this Court has, in effect, already determined the ordinance provisions to be unconstitutional. We disagree vigorously with this position. We submit that this Court has never even hinted at its reaction to such procedures. In fact, this Court has pointedly refrained from taking a stand.

In *Burstyn v. Wilson* (1952), 343 U. S. 495, where this Court struck down a New York statute found defective due

to vagueness, the Court specifically rejected any misinterpretation of its holdings by saying (pp. 505, 506) :

“ . . . it is not necessary for us to decide . . . whether a state may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene films. That is a very different question from the one now before us.”

Petitioner also takes the stand that the landmark case of *Near v. Minnesota* (1931), 283 U. S. 697, supports its position. Of course, the *Near* case involved a Minnesota statute which empowered authorities to restrain future publications merely because prior publications had been found offensive. There, too, this Court carefully pointed out (p. 716) :

“ . . . the primary requirements of decency may be enforced against obscene publications.”

Despite the plethora of cases cited by petitioner, none sustain its argument, for no case yet decided has reached a conclusion on the facts here presented. Petitioner's authorities serve to sustain our position as well.

*Kingsley Pictures Corp. v. Regents* (1959), 360 U. S. 684 (“*Lady Chatterley's Lover*”), struck down a New York Statute which permitted rejection of a movie because it presented adultery in a favorable light. As in the *Burstyn* case, no question of obscenity was in issue.

*Gelling v. Texas* (1952), 343 U. S. 960, involved an ordinance which permitted rejection of motion pictures when the local Board was “of the opinion” that the motion picture was “of such character as to be prejudicial to the best interest of the people.” This certainly established no standard or criterion.

*Superior Films, Inc. v. Dept. of Education and Commercial Pictures Corp. v. Regents* (1954), 346 U. S. 587, both involved a *per curiam* decision of this Court striking

down certain statutes on the basis of the *Burstyn* case. Examination of the decisions in the courts below (159 Ohio St. 315, 112 N. E. 2d 311; 305 N. Y. 336, 113 N. E. 2d 502), denotes faulty statutes from the viewpoint of clear, definite language.

Every other authority which petitioner relies upon has the same general objection. That is, the cases involve matters which are not decisive of the issue here. Many of petitioner's cases relate to freedom of religion and to prohibition of pamphlet distribution, no matter what was contained in the pamphlets.

We are confronted with a specific question. Does the City of Chicago have the right to require submission of motion pictures for inspection prior to public exhibition? And, if so, may the City of Chicago refuse a permit to publicly exhibit such motion pictures if the content is obscene?

Petitioner's remedy, if any, is found in the Due Process Clause of the 14th Amendment. Under the decisions of this Court such Clause prohibits state laws which abridge freedom of speech or of the press. This Court held in the *Burstyn* case that the protective mantle of the 14th amendment extended to motion pictures (343 U. S. 495, 502).

Although the rights of free speech are fundamental, they are not in their nature absolute and their exercise is subject to restriction. *Whitney v. California* (1927), 274 U. S. 357, 373. Granted then that motion pictures are a form of speech contemplated by the First and Fourteenth Amendments, and that freedom of speech is not absolute, it remains only to determine what restrictions may be placed upon motion pictures in keeping with the general pronouncements of this Court. We know that there are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been

thought to raise any Constitutional problem. These include the 'obscene and those which tend to incite an immediate breach of the peace. *Chaplinsky v. New Hampshire* (1942), 315 U. S. 568, 571, 572; *Beauharnais v. Illinois* (1952), 343 U. S. 250, 255, 256. A breach of the peace includes not only violent acts, but acts and words likely to produce violence in others. *Cantwell v. Connecticut* (1940), 310 U. S. 296, 308. Thus the ordinance here being considered prohibits motion pictures which lead to a breach of the peace or riots. It would be a sad commentary, indeed, if Chicago, or any municipality, were powerless to prohibit films leading to such disastrous results. Free speech certainly is not all-encompassing. There are those who advocate public exhibition of the motion picture, with subsequent punishment for the exhibitor after the riots occur. We reject such a contingency. Nor do we believe that we must allow the public exhibition of an obscene movie pending criminal proceedings against the exhibitor. We believe that the municipality must have the right to act in the best interests of its people, and that such action is not an infringement of the constitutional freedoms implicit in the First and Fourteenth Amendments.

It is universally recognized, and this Court has so said, that a state or city may prohibit acts or things reasonably thought to bring evil or harm to its people. *Kovacs v. Cooper* (1949), 336 U. S. 77, 83. We know from refusal to submit that the motion picture is obscene, that it would cause breaches of the peace and riots and that it offends in every particular spelled out in the ordinance. Must the City sit by and let these events take place? Is there some Constitutional requirement that prevents the City from prohibiting motion pictures "reasonably thought to bring evil or harm to its people?" We are assured that the Constitution contains no such requirement. We are certain that to so hold would distort the Constitution, not sustain it.



Movies, like television, cannot be placed in the same category with newspapers, books, magazines, and the like. The appeal of the motion picture to the young and innocent, to the susceptible, and to the potential killer, rapist or armed robber, require some kind of governmental protection. In *Kingsley* this Court said that it was not there required to (360 U. S. 84, 689, 690):

“... determine whether, despite problems peculiar to motion pictures, the controls which a State may impose upon this medium of expression are precisely coextensive with those allowable for newspapers, books, or individual speech.”

Now, however, this Court is called upon to determine whether they are coextensive. We contend there is a vast difference. We agree with petitioner that the time has come for the Court to resolve this perplexing problem which has so confounded the several states and numerous municipalities since this Court's decision in the *Burstyn* case. The diverse interpretations which have stemmed from that case demand clarification and guidance.

In *Roth v. United States* (*Alberts v. California*), 354 U. S. 476 (1957), this Court stated that for the first time the question of whether obscenity was within the area of protected speech and press was squarely presented to the Court (p. 481), and concluded (p. 485):

“We hold that obscenity is not within the area of constitutionally protected speech or press.” (Emphasis supplied.)

Having so held, we must now determine whether or not a City may prohibit the public exhibition of an obscene movie. Petitioner says that to do so is unconstitutional. Petitioner further argues that it should be permitted to continue the public exhibition of an obscene movie pending the prosecution of a criminal proceeding against it. This, of



course, is to give petitioner everything it wants. For movies are temporary things, of interest to the general public for only a brief time. Long before the lengthy criminal proceeding ends, the offending movie will have finished its run and gone on to other cities. Petitioner always has a remedy in law. The courts are ever concerned with freedoms and liberties wrongfully withheld. They will assuredly protect the petitioner if protection is proper. But, petitioner does not want this. Petitioner seeks to exhibit what it pleases for as long as it likes under the guise of "freedom of speech." It is a one-sided freedom. The duty of the municipality to act in the best interests of its people must also be considered. Petitioner is not the only one proud of liberty and freedom. We, too, have the same genuine desire for such constitutional guarantees. We, too, will fight for their retention. But, they are not absolute.

The sole issue confronting this Court is this: *Is previous restraint of speech unconstitutional per se?* This is the crux of the case. No decision of this Court has so held. No language of this Court, however remote, has so indicated. By way of *obiter dictum* this Court has made many observations, not necessarily related to the issue before the Court, but even here petitioner can find no purposeful, meaningful language. This is not to say that certain members of the Court, past or present, may have been so persuaded.

*Near v. Minnesota* recognized that protection against previous restraint was not absolutely unlimited (283 U. S. 697, 716), and in *Kingsley Books, Inc. v. Brown* (1957), 354 U. S. 436, this Court gave its approval to a form of prior restraint (pp. 441-444). In the latter case, this Court distinguished its holding in *Near* by pointing out (p. 445);

“ . . . the difference between *Near* . . . and this case is glaring in fact. . . . Minnesota empowered its courts to enjoin the dissemination of future issues of a

publication because its past issues had been found offensive. \* \* \* This is the essence of censorship.'  
\* \* \*

Thus, in *Kingsley Books, Inc. v. Brown*, this Court upheld an injunctive remedy against obscene publications as opposed to the contention that this was a form of unconstitutional "prior censorship of literary product."

In *Kingsley Books* this Court also rejected the argument that (p. 441):

"\* \* \* something can be drawn out of the Due Process Clause of the Fourteenth Amendment that restricts New York to the criminal process in seeking to protect its people against the dissemination of pornography. *It is not for this Court thus to limit the State in resorting to various weapons in the armory of the law. Whether proscribed conduct is to be visited by a criminal prosecution or by a qui tam action or by an injunction or by some or all of these remedies in combination, is a matter within the legislature's range or choice.*"  
(Italics Ours.)

We sincerely contend that this Court should not limit the City of Chicago in resorting to every available legal weapon it may have to combat obscenity in motion pictures publicly exhibited to all people. We hope that the right to prevent motion pictures leading to riots and breaches of the peace will be secured. We believe that the legislative body of the municipality has endeavored to employ all remedies within its power to meet these evils and we trust that the judiciary will not destroy these remedies or the will of municipal officials to protect individuals from riots and breaches of the peace.

As previously stated, petitioner is not without remedy. Resort to the courts is open to everyone as has been proven time and again in this very field. Yet, the most effective remedy that government may employ is here challenged as being unconstitutional. When we weigh the conse-

quences and the remedies, it is clear that petitioner is legally secure, whatever course is followed.

The excellent publicity and flagrant, boastful advertising that follows litigation of this nature is a matter of common knowledge. If the courts allow the municipal judgment to be overthrown, and if a motion picture is eventually exhibited, its owner benefits tremendously. The converse, unhappily, is not true. If an obscene picture may run its course pending protracted criminal proceedings, the damage is done.

Every nation in history has succumbed to defeat, and oftentimes to oblivion, because of decadence, weakness, a relaxation of moral fiber. If our nation does not remain diligent, it too, may one day enter its decline and eventual fall. When this day comes, it will, in a large measure, be attributable to our becoming decadent.

No one wants us to be puritan, anymore than it is desired to be weak or immoral. Neither the petitioner nor this Court has a more vibrant and dedicated belief in liberty and freedom than these respondents.

What, then, is the answer? It is for this Court to lead the way, for it is with this Court that the ultimate responsibility rests. The Court must adhere to a middle-of-the-road policy—a road that is flanked by two precipices. The one drops off to moral debasement, the other to witch-hunting, thought-strangulation, puritan regimentation. Neither course is for America. This Court must take the helm and lead us—both sides to this controversy—down the middle path where motion pictures will be subject to only such prior restraint as may be necessary to prohibit the obscene, the immoral and those motion pictures which tend to produce a breach of the peace and riots.

**CONCLUSION.**

We have demonstrated that petitioner seeks an abstract decision with no real controversy or substantial federal question before the Court.

We have shown that free speech is not absolute, but subject to certain well-defined and narrowly-limited exceptions. We have proven that the obscene and words or actions leading to riots or breaches of the peace are not constitutionally protected.

We have further shown that the right of municipalities to protect its citizens from harm includes the remedy here considered.

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1960

No. 34

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TIMES FILM CORPORATION,

*Petitioner,*

v.

CITY OF CHICAGO, RICHARD J. DALEY and  
TIMOTHY J. O'CONNOR,

*Respondents.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE SEVENTH CIRCUIT



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**REPLY BRIEF FOR PETITIONER**

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IN THE  
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**REPLY BRIEF FOR PETITIONER**

It is admitted by Respondents that the issue here is: Does prior censorship of motion pictures clash with the First Amendment guarantees, as made applicable to the states through the Fourteenth?

Respondents cannot cite a single instance in which this Court has acted in other fashion than to invalidate prior censorship of speech. There is no such instance in our judicial history—even in Colonial days speech was not subjected to the imprimatur of the censor. Our Brief is interspersed with some of the great array of cases which stand for the proposition that censorship is indeed an ideology foreign to our system.

As this Court has held repeatedly that motion pictures fall under the protective scope of the First Amendment and the *general* rules pertaining thereto apply, it follows that Chicago cannot erect a censor's barrier between the motion picture as a form of speech, and the public. Such a barrier must tumble down irrespective of the form of the speech.

Respondents seek to base their Big Brother role on the totally unsubstantiated assumption that censorship is an "effective" remedy. A mere perusal of the Record in *Times Film Corporation v. City of Chicago*, 355 U. S. 35 (1957), which sheds "light" on the actual operation of Respondents' board, can easily lead to the opposite conclusion, that censorship as a remedy is most inept. The degree of "effectiveness" of a remedy is not, of course, determinative of its constitutionality.

Respondents state that we seek our constitutional guarantee to exhibit "what we please" as long as we "like it" under the "guise" of freedom. We submit that the issue as to whether speech is an absolute is a different one from the question here before the Court. Our Brief (pp. 30, 31, 35) is in fact replete with references to other methods of control, all less harsh than out-and-out censorship. Forty-six of our states and the vast majority of our communities rely on statutes of subsequent enforcement to deal with obscenity and anti-social conduct. In Chicago, a "permit" pursuant to the ordinance does not immunize the holder against the operation of the Illinois Penal Code. *Is reliance on our traditional judicial processes the "moral debasement" to which Respondents refer?*



We submit that the invalid censorship accomplishes but *one* thing: it chokes off the moving picture as one of the communicating arts in Chicago, a great city which has been traditionally identified with the arts. We must, therefore, reject Respondents' plea for "peaceful coexistence". There can be only the demise of the censor here, lest free speech perish in Chicago.

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COPY IN THE  
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**BRIEF AMIGUS CURIAE FOR INDEPENDENT FILM  
IMPORTERS AND DISTRIBUTORS OF AMERICA, INC.  
AND MOTION FOR LEAVE TO FILE BRIEF**

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IN THE  
**Supreme Court of the United States**

**OCTOBER TERM, 1959**

**No. 689**

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**TIMES FILM CORPORATION,**

*Petitioner,*

**v.**

**CITY OF CHICAGO, RICHARD J. DALEY and  
TIMOTHY J. O'CONNOR,**

*Respondents.*

---

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE SEVENTH CIRCUIT**

---

**Motion of Independent Film Importers and Distribu-  
tors of America, Inc. for Leave to File Brief as  
Amicus Curiae**

Independent Film Importers and Distributors of America, Inc. (herein called IFIDA) respectfully moves this court for leave to file a brief in this case as amicus curiae. The consent of the attorney for the petitioner herein has been obtained, but the attorney for the respondents has refused to consent in writing to the filing of a brief by IFIDA as amicus curiae.

The applicant has a substantial interest in this case. It is a trade association comprising a substantial majority of the importer-distributors of for-

eign motion pictures into the United States. Our members are intimately concerned with the problems of regulation and censorship of motion pictures which are posed on this appeal. Their motion pictures are subjected to regulation under the Chicago ordinance and under other statutes and ordinances of similar import. In this particular case the motion picture involved is a foreign motion picture. The clarification of the question of the legality of prior censorship is of direct and vital importance to our members.

A major issue of peculiar importance to applicant was not dealt with by petitioner in its brief in the Court of Appeals. Nor do we expect that it will be dealt with by petitioner in its brief to this court. This is the relationship between federal customs regulation of imported motion pictures and local censorship under the constitution. This issue is discussed in our proposed brief amicus curiae. If the court approves our argument the decision of the court below should be reversed.

It is therefore respectfully requested that IFIDA be granted leave to file a brief amicus curiae.

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IN THE  
**Supreme Court of the United States**

**OCTOBER TERM, 1959**

**No. 689**

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**BRIEF AMICUS CURIAE FOR INDEPENDENT FILM  
IMPORTERS AND DISTRIBUTORS OF AMERICA, INC.**

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**Statement**

This brief Amicus Curiae is submitted on behalf of the Independent Film Importers and Distributors of America, Inc. (hereinafter called "IFIDA"). This organization represents a majority of the importers and distributors of foreign films in the United States. It has a special interest in the problems presented on this petition because its motion pictures, among others, are subject to the pre-censorship provisions of the Chicago ordinance as well as other such statutes and ordinances throughout the land.

The facts of this proceeding are, we believe, fairly stated in petitioner's brief and we do not wish to burden the Court with an additional recitation.

## **The Issues**

1. Is the censorship ordinance of the City of Chicago invalid per se as a prior restraint on free speech under the First and Fourteenth Amendments to the Constitution.
2. May foreign motion pictures imported into the United States and subjected to inspection for obscenity under the Federal Customs Law, be Constitutionally subjected to additional regulation under Chicago's licensing ordinance.

## **POINTS**

### **I**

**The guarantee of free expression in the First Amendment to the Constitution is the basic guarantee of a free society. To subject any medium of expression to a requirement of pre-censoring before public showing or publication is contrary to the Constitution.**

The motion pictures distributed by the members of IFIDA come from all quarters of the globe. They represent the expressions and ideas of film makers everywhere. It is true that some of the ideas and expressions contained in them are controversial. It is true that some of the ideas and expressions contained in them are contrary to the concepts of some Americans. It is true that in their mode of expression some individuals may find matter objectionable to them.

But the critical factor is that these are expressions entitled, as are expressions in all other media, to the full freedom of the market place of ideas. When these

ideas are obscene, they may be dealt with within the traditional framework of the judicial process. This restraint follows exhibition (or publication) and does not come before. To deny the right to exhibit in advance without censorship is to affirm for motion pictures a restriction we believe unlawful in any other expression of speech.

We are convinced that foreign motion pictures have an important message for America. They tell of the customs, the cultures, the hopes and the dreams of peoples of other lands. We do not acclaim their superior virtues as such, but we submit that in the market place of free ideas it is the essence of democracy that they should not run the risk of suppression prior to showing. This is what we believe to be the un-Constitutional vice of the Chicago ordinance. It authorizes and, in fact, requires, a pre-submission of content before a film can be publicly shown, and if that content displeases the censors for any reason within the scope of the ordinance, that film may be banned and prevented from ever being shown. It is undeniable that this is a prior restraint of a most arbitrary character. It is the same type of prior restraint that since the classic case of *Near vs. Minnesota*, 283 U. S. 697 (1935) this Court has repeatedly condemned in all other media. We submit that there is no good reason to support this distinction. Pre-censorship should be equally invalid in this area as in any other area. The First Amendment and the Fourteenth Amendment should not be held to differentiate between varying methods of expression. We ask this Court to reverse this decision and to find that motion pictures are entitled, not to partial rights, not to half-way privileges, but to the full freedom of speech guaranteed by the Constitution.



## II

Foreign motion pictures have been previously adjudged for obscenity by the United States Customs before entry into the United States. There can therefore be no constitutional justification for a further requirement of municipal pre-censorship.

Under the doctrine of the various motion picture cases decided by this Court in recent years the powers of local censors have been repeatedly limited. See, e. g., *Burstyn vs. Wilson*, 343 U. S. 495 (1952); *Kingsley International Pictures Corporation vs. Board of Regents*, 360 U. S. 684 (1959). A host of criteria have been demolished by the courts as proper standards. Today the sole significant lingering standard is obscenity. This is now the entire thrust of the existing censorship pattern.

Under Title 19 U. S. Code Annotated, Section 1305, all persons are prohibited from importing into the United States from any foreign country any "obscene" picture or other article which is "obscene or immoral." Similarly, under Section 1462 of Title 18 of the U. S. Code Annotated, the bringing into the United States of an obscene motion picture film is a criminal act. It is clear, therefore, that obscene matter including film cannot lawfully be imported into the United States and that those who do import it are subject to criminal penalties. No foreign film can reach this shore without passing the authority of Customs.

We submit that these requirements are more than a sufficient guard against the unwarranted fears of

obscenity from abroad if prior censorship is abolished. The very purpose for which censorship laws are applied to foreign films has already been predetermined by Federal authority. Certainly, the insistence on numerous clearances for foreign motion pictures is unreasonable.

The Constitution holds that, in the Federal sphere, the acts of the Federal Government are supreme. This Court has repeatedly and recently construed the Constitution to prevent joint application of Federal and State legislation particularly where there is a danger of duplicate penalties and a clear Federal preemption of the field. See *Pennsylvania vs. Nelson*, 350 U. S. 497 (1956); *Garner vs. Teamsters*, 346 U. S. 485 (1953); *Hines vs. Davidowitz*, 312 U. S. 52 (1941). As the Customs statutes cited above indicate, obscene motion pictures may be and are barred from entering this country under Federal regulatory procedures. This being so, we contend that, under the cases, the States and municipalities should not be entitled to censor foreign films where the Federal Government has already occupied the field, particularly in an area where the Federal Government's superiority cannot be denied.

Accordingly, we ask this Court to rule that motion pictures imported from abroad, such as "Don Juan" should not be subjected to dual determination as to obscenity and that, by its application thereto, Chicago's ordinance is unconstitutional.

### Conclusion

We believe that motion pictures are entitled to be entirely free from censorship like other media of expression under the First and Fourteenth Amendments. In any event, we submit that the Federal Government, having occupied the field of import regulations for foreign films, under the Constitution, these films may not be thereafter subjected to municipal censorship.

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*Of Counsel*

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1960

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**TIMES FILM CORPORATION,**

*Petitioner,*

*vs.*

**CITY OF CHICAGO, RICHARD J. DALEY and  
TIMOTHY J. O'CONNOR,**

*Respondents.*

**On Certiorari from the United States Court of Appeals  
for the Seventh Circuit**

**MOTION FOR LEAVE TO FILE BRIEF ON BEHALF OF  
MOTION PICTURE ASSOCIATION OF AMERICA, INC.  
AS AMICUS CURIAE AND BRIEF AS AMICUS CURIAE**

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# INDEX

	PAGE
Position and Interest of Amicus Curiae, Motion Picture Association .....	1
Argument .....	3
The Scope and Effect of Motion Picture Regulation Throughout the United States .....	3
Examination of and Restrictions on the Content of Speech Prior to Dissemination Have Not Been Tolerated by this Court, with Respect to Any Other Media of Communication .....	8
A. The Written Word or "Press" .....	9
1. Newspapers, Magazines and Books .....	9
2. Handbills .....	11
B. The Spoken Word .....	12
1. Sound Trucks .....	12
2. The "Soap Box" Orator .....	13
3. Soliciting for Labor Unions .....	14
4. Broadcasting .....	15
5. Lobbying .....	17
C. Conclusion .....	17
There Is No Justifiable Basis for a Distinction in Treatment of Motion Pictures and other Media of Communication .....	18
Conclusion .....	24

## Table of Cases Cited

Adams v. Hinkle, 51 Wash. 2d 263, 322 P. 2d 844 (1958) .....	10
Alberts v. California, 354 U. S. 476 .....	8
Allen B. Dumont Laboratories v. Carroll, 184 F. 2d 153 (3rd Cir. 1950) cert. den. 340 U. S. 929 .....	16
Aurora v. Warner Bros. Pictures Dist. Corp., 16 Ill. App. 2d 273, 147 N. E. 2d 694 (1958) .....	3

## Constitutional Provisions and Statutes Cited

	PAGE
<i>Federal Statutes:</i>	
United States Constitution Article 1, section 8, clause 8 .....	18
U. S. Const. Amend. I, XIV .....	2, 11
2 U. S. C. §§ 261-270 .....	17
18 U. S. C. §§ 1461, 1462 .....	8, 23
Act of August 24, 1912, 37 Stat. 488, 17 U. S. C. 5(1)(m) .....	18
Communications Act of 1934, Sec. 312(a), 48 Stat. 1086; 326 48 Stat. 1091; 47 U. S. C. 312(a), 326 ..	6, 16
<i>State Statutes:</i>	
Ill. Rev. Stat., Chap. 38, Sec. 470 .....	3
Kansas Gen. Statutes Ann. Sec. 51-101 to 51-114, 74-2201 to 2209 .....	4
Maryland Code Ann. Art. 66 A Sec. 1-26 (1957) ..	4
N. Y. Educ. Law Sec. 122-132 .....	4
Pennsylvania Act of September 17, 1959, P. L. 902, §§ 1-14, 4 Purdon's Penna. Stat. Anno. §§70.1- 70.14 .....	4, 5
Virginia Code, Title 2, Sections 98-116 (1950) ....	4
<i>Municipal Ordinances:</i>	
Abilene, Texas, Ordinance No. 907, January 15, 1959 .....	6
Chicago, Ill. Municipal Code, Chap. 155, Sec. 155- 1-155-5 .....	2
Kansas City Rev. Ordinances, Chap. 51, Sec. 51-1.5 (1956) .....	6
Palo Alto, Calif. Ordinance No. 5, March 22, 1954 ..	4
Springfield, Mo. Council Bill No. 451, Resolution No. 2395 (March 29, 1954) .....	4

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	PAGE
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IN THE  
**Supreme Court of the United States**

**OCTOBER TERM, 1960**

**No. 34**

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**TIMES FILM CORPORATION,**

*Petitioner,*

*vs.*

**CITY OF CHICAGO, RICHARD J. DALEY and  
TIMOTHY J. O'CONNOR,**

*Respondents.*

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**On Certiorari from the United States Court of Appeals  
for the Seventh Circuit**

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**MOTION FOR LEAVE TO FILE BRIEF ON BEHALF OF  
MOTION PICTURE ASSOCIATION OF AMERICA, INC.  
AS AMICUS CURIAE AND BRIEF AS AMICUS CURIAE**

Motion Picture Association of America, Inc. hereby respectfully moves for leave to file as *amicus curiae* in this case the brief appended hereto. The consent of the attorney for the petitioner has been obtained. On August 11, 1960 movant wrote the attorney for the respondent. A copy of that letter is appended below. No acknowledgment was received and in a telephone conversation to the respondents' attorney on August 17, 1960 movant was informed that no reply would be forthcoming.

Motion Picture Association of America, Inc., hereinafter referred to as the "Motion Picture Association" or "Association," is a corporation, organized in March, 1922 under the Membership Corporations Law of New York, for the objects, among others, of fostering the common interests of those engaged in the motion picture industry in the United States by establishing and maintaining the highest possible moral and artistic standards in motion picture production, by developing the educa-

tional as well as the entertainment value and general usefulness of the motion picture, and by diffusing accurate and reliable information with reference to the industry.

The President of the Association is Eric A. Johnston and its membership is composed of the largest and most important companies engaged in production and distribution of motion pictures. Its distributing company members are: Allied Artists Pictures Corporation, Buena Vista Film Distribution Company, Inc., Columbia Pictures Corporation, Metro-Goldwyn-Mayer Inc., Paramount Pictures Corporation, Twentieth Century-Fox Film Corp., United Artists Corporation, Universal Pictures Company, Inc., and Warner Bros. Pictures Distributing Corp. These companies distribute motion pictures made by them or by others for distribution by them at studios, mainly in Los Angeles, and sometimes abroad. They furnish, it is estimated, more than 90% of the motion pictures annually exhibited in motion picture theatres in cities, towns and villages throughout the United States, including the City of Chicago. The petitioner, Times Film Corporation, is not a member of the Association.

From its inception, the Association has been concerned with the moral content of motion pictures and their evaluation as to moral content by the people of the United States. The Association and its members have also been conscious of the social importance of motion pictures as a medium of mass communication and the responsibilities thereby imposed in relation to government, municipal, state and federal.

Its members, therefore, have a vital interest in the disposition of the constitutional question presented to the Court in this case. It is believed that the brief appended hereto, which the Association requests permission to file as *amicus curiae*, contains a more complete survey of the scope and effect of censorship regulation of motion pictures in the United States, similar to the Chicago ordinance under review, than the parties plan to present for the information of the Court.

WHEREFORE, it is respectfully urged that Motion Picture Association be granted leave to file herewith the appended brief as *amicus curiae*.

Respectfully submitted,

SIDNEY A. SCHREIBER,  
*Attorney for Motion Picture  
 Association of America, Inc.,*  
 28 West 44th Street,  
 New York 36, New York.

BARBARA A. SCOTT,  
*of Counsel.*  
 New York, August 24, 1960.

### APPENDIX A

MOTION PICTURE ASSOCIATION  
 OF AMERICA, INC.  
 28 West 44th Street  
 New York 36, N. Y.

ERIC JOHNSTON  
*President*

OFFICE OF  
 SIDNEY SCHREIBER  
*General Attorney*

AIR MAIL

August 11, 1960

Sydney R. Drebin, Esq.  
 Assistant Corporation Counsel  
 511 City Hall  
 Chicago 2, Illinois

Dear Mr. Drebin:

This Association desires to file a brief *amicus curiae* in the Supreme Court of the United States in *Times Film Corporation, petitioner v. City of Chicago, et al.* The attorneys for the petitioner have given their consent and have stated that you have kindly indicated that the respondents' consent would be granted. Your response will be appreciated.

Yours faithfully,

/s/ SIDNEY SCHREIBER

IN THE  
**Supreme Court of the United States**  
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CITY OF CHICAGO, RICHARD J. DALEY and  
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*Respondents.*

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On Certiorari from the United States Court of Appeals  
for the Seventh Circuit

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**BRIEF OF MOTION PICTURE ASSOCIATION  
OF AMERICA, INC., AS AMICUS CURIAE**

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**Position and Interest of Amicus Curiae,  
Motion Picture Association**

The Motion Picture Association is a membership corporation organized in March, 1922. Its members, the major producers and distributors of motion pictures in the United States, distribute 90% of all motion pictures exhibited in motion picture theatres throughout the United States.

One of the primary objects of the Association has been to establish and maintain "the highest possible moral and artistic standards in motion picture production".<sup>1</sup> In furtherance of this objective, the Association has adopted a Production Code which sets forth certain standards which

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<sup>1</sup> By-laws, Motion Picture Association, Art. 1, Sec. 3.

must be met and maintained by its members in the motion pictures made or distributed by them.<sup>2</sup> Nevertheless, motion pictures distributed by the members of the Association have been consistently subjected to administrative censorship by municipalities as well as by states. Association members are, therefore, vitally affected by such censorship regulations.

The Association files this brief in support of petitioner<sup>3</sup> because it believes that statutes such as the Chicago ordinance involved in this action which subject motion pictures to examination as to content as a condition of distribution and exhibition are contrary to the First and Fourteenth Amendments to the United States Constitution.

The Municipal Code of Chicago, Chapter 155, Sections 155-1 to 155-5, provides that no motion picture may be exhibited in a motion picture theatre in the City of Chicago unless a permit is first secured from the Commissioner of Police. The statute requires that a permit may be granted "only after the motion picture film . . . has been produced at the office of Commissioner of Police for examination or censorship" (§ 155-4).

Statutes similar to this ordinance exist in five states and approximately fifteen municipalities; modified forms of inspection and approval by governmental officials exist in twenty-four other municipalities.<sup>4</sup> Some of these statutes are actively enforced; others appear to be dormant or sporadically enforced. The necessity of submitting motion pictures for inspection under such censorship provisions inflicts, it is submitted, an unconstitutional restraint upon motion pictures.

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<sup>2</sup> For a discussion of the Motion Picture Association and the Production Code see "Self-Policing of the Movie and Publishing Industry"; Hearings before Subcommittee on Postal Operations of the House Committee on Post Office and Civil Service, 86th Cong., 2nd Sess. (1960).

<sup>3</sup> Petitioner has consented to the filing of this brief.

<sup>4</sup> See Appendix "A".

It is not contended that motion pictures are beyond the purview of all governmental control. The Association does not sanction nor do its members distribute any "obscene" motion pictures. Exhibition of such motion pictures is adequately prevented in most communities, including Chicago, by the presence of penal statutes prohibiting their exhibition.<sup>5</sup> What is challenged is the right of Chicago and other communities to adopt regulations which create administrative prior restraints (sometimes called preventive censorship) on freedom of speech by motion pictures.

Motion pictures are today the only form of communication by speech or press subjected to such licensing, contingent upon the examination of content prior to dissemination. There is no justifiable basis for this distinction.

### **The Scope and Effect of Motion Picture Regulation Throughout the United States**

The number of governmental bodies imposing censorship on motion picture films was naturally affected by this Court's pronouncement in *Joseph Burstyn Inc. v. Wilson*, 343 U. S. 495, that motion pictures are entitled to the protection and guarantees of the First Amendment. The *Burstyn* decision and this Court's *per curiam* decisions subsequent to it were not, however, interpreted with any uniformity by censoring communities. Some communities believed the decisions completely invalidated all motion picture censorship.<sup>6</sup> Other communities believed only vague

<sup>5</sup> See Ill. Rev. Stat., Chap. 38, Sec. 470. The Illinois Courts have sanctioned the use of a preliminary injunction at the instance of a city to prohibit the exhibition of an allegedly "obscene" motion picture. *Aurora v. Warner Bros. Pictures Dist. Corp.*, 16 Ill. App. 2d 273, 147 N. E. 2d 694 (1958). See as to the experience of the motion picture "Baby Doll" involved in that case, Gellhorn, *American Rights—Constitution in Action* (1960), p. 183 ff.

<sup>6</sup> Ohio: *RKO Radio Pictures v. Ohio, Capitol Enterprises v. Ohio*, 162 Ohio St. 263, 122 N. E. 2d 769 (1954). Massachusetts: *Brattle Films, Inc. v. Commissioner of Public Safety*, 333 Mass. 58, 127 N. E. 2d 891 (1955).



and indefinite standards had been affected by the decisions.<sup>7</sup> Indeed, the Pennsylvania legislature recently enacted a new Motion Picture Control Act,<sup>8</sup> which has been declared unconstitutional by the Dauphin County Court of Common Pleas. *Twentieth Century-Fox v. Boehm, William Goldman Theatres, Inc. v. Dana*, — District and County Rep. (2) — (July 31, 1960).

In the belief that the *Burstyn* decision had made prior approval of motion pictures by a censor invalid, several municipalities repealed or modified their censorship ordinances.<sup>9</sup> But even though the invalidity of motion picture censorship has been recognized by some communities, many others continue to make the distribution and exhibition of motion pictures contingent upon the approval of a government official.

Laws similar to the Chicago ordinance exist in four states<sup>10</sup> and fifteen municipalities.<sup>11</sup> The officials entrusted with the power to grant or deny licenses and permits may vary from the Chief of Police to members of women's organizations.<sup>11</sup> In some instances power is vested in one individual. In other instances the power is vested in a board appointed by the Mayor or City Council. Although

<sup>7</sup>Pennsylvania: *Hallmark Productions v. Carroll*, 384 Pa. 348, 121 A. 2d 584 (1956); Kansas: *Holmby v. Vaughn*, 177 Kan. 728, 282 P. 2d 412, rev'd 350 U. S. 870. New York: *Commercial Pictures Corp. v. Regents*, 305 N. Y. 336, 113 N. E. 2d 502, rev'd 346 U. S. 587.

<sup>8</sup> Act of September 17, 1959, P. L. 902, § 1-14, 4 Purdon's Penna. Stat. Anno. § 70.1-70.14.

<sup>9</sup> See for example, Springfield, Mo. Council Bill No. 451, Resolution No. 2395 dissolving the Board of Censors, dated 3/29/54; Repeal of Sec. 15.02 of Palo Alto, Calif. Ordinance No. 5 which provided for 7 days advance notice to and approval by Board of Commercial Amusements, March 22, 1954; Repeal of Pine Bluff, Ark. censorship ordinance, April 24, 1954.

<sup>10</sup> Kansas Gen. Statutes Ann., Sec. 51-101 to 51-114, 74-2201 to 74-2209; Maryland Ann. Code, Art. 66A §1-26; New York Educ. Law, §§ 122-132; Virginia Code, Title 2, Sec. 98-116.

<sup>11</sup> See Appendix A, I, *infra*.

there may be variation as to technicalities,<sup>12</sup> in each instance one provision is constant—no picture may be shown until it has been licensed by the governmental authority.

Another type of control is found in those ordinances which do not require a license or a permit before exhibition but require instead that notice of all films to be exhibited be given to a censoring body prior to exhibition. The 1959 Pennsylvania Motion Picture Control Act and the ordinances of six municipalities<sup>13</sup> have adopted this type of control. The amount of notice required varies from community to community.<sup>14</sup>

The procedure following the receipt of notice also varies. In some communities all pictures are examined before exhibition; in others only the "questionable" pictures are previewed before exhibition. In still other communities motion pictures are reviewed only during exhibition at a motion picture theatre and are censored at that time. All pictures are or may be subject to content examination and approval by a governmental official before dissemination, thereby imposing a prior restraint upon the distribution of motion pictures.<sup>15</sup>

There are, in addition, ordinances which require neither licenses nor advance notice. Motion pictures are examined as to content at a regular performance by appointed

<sup>12</sup> For a detailed discussion of the operation of Censorship Boards, See, *Entertainment: Public Pressures and the Law*, 71 Harv. L. Rev. 326, 328-334.

<sup>13</sup> See Appendix A, II, *infra*.

<sup>14</sup> Pennsylvania requires 48 hours; Birmingham, Alabama, 24 hours; West St. Paul, Minnesota, 7 days; Lansing, Michigan, 3 days; Spokane, Washington, 15 days; and Gary, Indiana and Memphis, Tennessee "as far in advance as possible". (Citations of municipal ordinances are found in Appendix A.)

<sup>15</sup> The requirement of advance notice was held to constitute an unconstitutional prior restraint in *Twentieth Century-Fox v. Boehm*, *supra*.

censors. This type of control is found in approximately 18 communities.<sup>16</sup>

Some communities<sup>17</sup> couple the power to ban or require deletions in objectionable motion pictures with the power to revoke licenses granted to motion picture theatres.<sup>18</sup> If the censoring body so recommends, or violations of the ordinances regulating the content of motion pictures occur, a theatre's license may be suspended or revoked.<sup>19</sup>

Although the number of communities imposing some type of control on motion picture content prior to dissemination has dwindled, there is still a residual part of censorship remaining. Indeed, even those ordinances which are now dormant, experience shows, can be reactivated with little difficulty if a particular motion picture for some reason offends persons or groups in the community.

It is submitted that, in the same manner as the constitutional freedom of all other manner of speech is abridged by the requirement of a license based upon prior examination of content, so a motion picture ordinance on its face

<sup>16</sup> See Appendix A, III. Under some of these ordinances all motion pictures are inspected; under others, only those about which specific complaints have been received. Some boards cannot ban, but can require exhibitors to post notices re the suitable audiences. (See Abilene, Texas, Ord. No. 907, 1/15/59.) Kansas City, Mo. provides that a license granted by the Motion Picture Reviewer may be revoked if during the regular exhibition fifteen citizens complain to the Board of Appeals. (Kansas City, Mo. Rev. Ordinances Chap. 51, § 51-1.5 (1956). Cf. Revocation of "The Miracle" license, *Joseph Burstyn Inc. v. Wilson* (*supra*).

<sup>17</sup> See Appendix A, Footnote 5.

<sup>18</sup> These licenses issued before a theatre may operate are generally based on health and safety regulations.

<sup>19</sup> Whether revocation of a license to do business because of the content of "speech" constitutes such a restraint of speech as to be deemed "censorship" is not at this time questioned. Cf. *Hannegan v. Esquire*, 327 U. S. 146; cases arising under § 312(a) of Communications Act of 1934.

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abridges that basic right if it bars expression until a license is issued after inspection of content.

This Court has said in *Board of Education v. Barnette*, 319 U. S. 624, 639:

"In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. *The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First is much more definite than the test when only the Fourteenth is involved.* Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard." (Emphasis added.)

And in *Thornhill v. Alabama*, 310 U. S. 88, the Court, after advertg to the pervasive threat inherent in the very existence of the power to license which "constitutes the danger to freedom of discussion," stated:

"Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression." 310 U. S. at pages 97-8.

Instances of arbitrary refusal simply aggravate the initial denial of due process.<sup>20</sup>

<sup>20</sup> Not all arbitrary exclusions from view and hearing are remedied by judicial process even though judicial process be invoked. See, for example, *United Artists Corp. v. Board of Censors*, 189 Tenn. 397, 225 S. W. 2d 550 (1949), cert. den. 339 U. S. 952 (1950), discussed in Kupferman and O'Brien *Motion Picture Censorship—The Memphis Blues*, 36 Cornell L. Q. 273, 274-278; *RD-DR Corporation v. Smith*, 183 F. (2d) 562 (5th Cir. 1950), cert. den. 340 U. S. 853, involving the bar by the City of Atlanta of the motion picture "Lost Boundaries".

**Examination of and Restrictions on the Content of Speech Prior to Dissemination Have Not Been Tolerated by This Court with Respect to Any Other Media of Communication**

The areas touched and affected by speech are numerous. The various media of communication—books, newspapers, magazines, radio and television—the solicitation of union members, the espousing of political and religious dogma through the use of sound trucks, handbills, and “soap box” oration, and lobbying for the passage of legislation all involve the basic right of freedom of speech. Motion pictures, too, have gained their rightful place with other media of communication and are now entitled to the protection and guarantees of the First Amendment, *Joseph Burstyn, Inc. v. Wilson*, *supra*; *Kingsley Pictures Corp. v. Regents*, 360 U. S. 684.

In each of these areas some regulation and controls have been evolved, as indeed they must be when various interests of the community must be balanced.<sup>21</sup> It is, however, highly significant that regulations of speech such as those imposed by the Chicago ordinance, requiring examination and approval as to the *content* of speech have never been sanctioned in any area of speech except motion pictures, even by those Justices of the Court who do not consider speech entitled to a “preferred position”. Indeed, such requirements have been characterized by this Court as “licensing and censorship” and have been consistently disapproved. There is no valid reason why any distinction should be made with respect to motion pictures.

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<sup>21</sup> Identification of publishers may be required (*Lewis Publishing Co. v. Morgan*, 229 U. S. 288); certain written matter may be declared non-mailable (18 U. S. C. § 1461, *Roth v. Goldman*, 172 F. (2d) 788 (2d Cir. 1949); *Roth v. United States*, 354 U. S. 476); the publication of obscene or criminally libelous speech may be punished (*Alberts v. California*, 354 U. S. 476; *Beauharnais v. Illinois*, 343 U. S. 250; *Chaplinsky v. N. H.*, 315 U. S. 568).

## A. The Written Word or "Press"

### 1. NEWSPAPERS, MAGAZINES, AND BOOKS

The abhorrence of systems of censorship found its genesis in attempts to control the content of the written word or "press". Indeed, it is inconceivable today that newspapers, magazines or books could be required to submit their proposed issues to police officials for inspection prior to distribution. Every attempt to subject newspapers, magazines or books to examination as to content prior to distribution has been found by this Court to violate our constitutional traditions. *Near v. Minnesota*, 283 U. S. 697, clearly established the immunity of newspapers from any content examination and restraint. Attempts by the Postmaster General to control the content of a magazine prior to its distribution were rightfully characterized as "censorship" and struck down in *Hannegan v. Esquire, Inc.*, 327 U. S. 146.<sup>22</sup> Indeed, Congress in enacting the postal laws clearly attempted to avoid "any semblance of censorship".

"When Congress has been concerned with the *content of matter* passing through the mails it has enacted criminal statutes making obscene or fraudulent or seditious literature non-mailable in any class." (Emphasis added) (327 U. S. 146, 156).

Recently some state legislatures, in an attempt to regulate the content of comic books have enacted laws which require examination, approval and licensing of comic books prior to distribution. The scheme presented by these comic book ordinances parallels that of the Chicago and similar motion picture ordinances. Magazines must be submitted to a government official or body for approval prior to their

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<sup>22</sup> Even the District Court which approved the actions of the Postmaster General was careful to characterize the Postmaster's actions as "grouping or classifying" rather than "censoring" which it defined as subjecting matter to scrutiny prior to release for the purpose of deleting objectionable portions. *Esquire v. Walker*, 55 F. Supp. 1015, 1021 (D. D. C. 1944).



distribution to the public. No court has sanctioned regulating comic book content if the ordinance required prior inspection by a police officer or administrative board. Such systems have been disavowed as prior restraints, violative of the First and Fourteenth Amendments. *Adams v. Hinkle*, 51 Wash. 2d, 263, 322 P. 2d 844 (1958).<sup>23</sup>

It is significant that the Senate subcommittee investigating the correlation of crime comic books and juvenile delinquency, although recognizing the possible dangers and impact of this medium, flatly rejected any suggestion of governmental censorship as totally repugnant to the principles of free speech.<sup>24</sup>

In those instances where this Court has sanctioned methods of controlling the content of books it has specifically exempted any system which might be deemed licensing or censorship. Justice Frankfurter, speaking for the majority, in *Kingsley Books, Inc. v. Brown*, 354 U. S. 436, said:

"Just as *Near v. Minnesota*, supra, one of the landmark opinions in shaping the constitutional protection of freedom of speech and of the press, left no doubts that 'Liberty of speech, and of the press, is also not an absolute right,' 283 U. S., at 708, it likewise made clear that 'the protection even as to previous restraint is not absolutely unlimited.' Id., at 716. *To be sure, the limitation is the exception; it is to be closely confined so as to preclude what may fairly be deemed licensing or censorship.*" 354 U. S. at page 441. (Emphasis added.)

<sup>23</sup> Moreover even those ordinances limiting regulation to criminal sanctions for the sale of crime magazines and books have been struck down. See *Winters v. New York*, 333 U. S. 507, and list of statutes struck down by the *Winters* decision (dissenting opinion of Frankfurter, J.); *Butler v. Michigan*, 352 U. S. 380; *Katzec v. Los Angeles*, 52 C. 2d 360, 341 P. 2d 310 (1959); *Siegel Enterprises v. Hepbron* (Baltimore Superior Court, 1960).

<sup>24</sup> "Comic Books and Juvenile Delinquency," Interim Report of the Subcommittee to Investigate Juvenile Delinquency of the Committee on the Judiciary, 84th Cong., 1st Sess. (1955), p. 23.



## 2. HAND BILLS

Similarly, attempts by municipal or state governments to condition the distribution of "handbills" upon advance "permission" or "license" subject to an administrative decision as to content have been consistently characterized by this Court as censorship and found violative of the Constitution.

Beginning with the ordinance before the Court in *Lovell v. Griffin*, 303 U. S. 444, which provided that no pamphlets could be distributed without the permission of the City Manager, through the California ordinance, rejected by this Court in *Talley v. California*, 362 U. S. 60, providing for the identification of the author or sponsor of the handbill or pamphlet, all ordinances conditioning the dissemination of ideas upon the approval of an official have been voided as "administrative censorship" abridging freedom of press and speech guaranteed by the First and Fourteenth Amendments.<sup>25</sup>

In the recent *Talley* case it is significant that even those Justices who believed the ordinance valid if it merely required identification, recognized the possible invalidity if it encroached upon and restrained speech prior to distribution (see Clark, J. dissenting, p. 71).

The disposition by this Court of the "handbill" ordinances is highly apposite to the instant case. The ordinances examined there and the Chicago motion picture

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<sup>25</sup> See *Schneider v. State*, 308 U. S. 147, permit required from Chief of Police who may ban distribution if applicant is "not of good character"; *Largent v. Texas*, 348 U. S. 418, permit required from Mayor if he deems it "proper or advisable"; *Cantwell v. Connecticut*, 310 U. S. 296, certificate required from Secretary of Public Welfare Council who may determine whether it is a "religious cause" or "bona fide charity". Cf. *Murdock v. Pennsylvania*, 319 U. S. 105, license required from Burgess of town. On the other hand, where approval as to content was not a factor, the ordinances have been sustained. *Breard v. Alexandria*, 341 U. S. 622.

ordinance here both condition distribution on examination by an administrative official who has the power to grant or withhold the necessary license or permit. Such systems constitute "license and censorship in its baldest form." *Lovell v. Griffin*, 303 U. S. at page 452.

## B. The Spoken Word

The spoken word, like the written word, cannot be subject to content examination prior to utterance. Whether speech emanate from a sound truck, or from a radio, whether it be a labor organizer soliciting members or a "religious fanatic" espousing his views in the park, this Court has never allowed an administrative censor to determine in his discretion what may or may not be spoken.

### 1. SOUND TRUCKS

This Court's disposition of ordinances regulating speech emanating from sound trucks cogently emphasizes the Court's refusal to sanction any regulation of the content of speech prior to its exercise. In *Saia v. New York*, 334 U. S. 558, a city ordinance provided that a loud speaker or amplifier could be used for speeches only if the Chief of Police determined that the proposed speech related to "items of news and matters of public concern" and thereafter granted a permit for their use. The language of the Court in striking down that ordinance applies equally to the Chicago motion picture censorship ordinance:

"The right to be heard is placed in the uncontrolled discretion of the Chief of Police. He stands athwart the channels of communication as an obstruction which can be removed only after criminal trial and conviction and lengthy appeal. A more effective previous restraint is difficult to imagine." 334 U. S. at page 561.

In *Kovacs v. Cooper*, 336 U. S. 77, decided six months later, the Court, in a 5-4 decision, held constitutional an

ordinance "forbidding the use on public streets of any sound trucks which emitted "loud and raucous noises." But the regulation in the *Kovacs* case did not provide for any examination or determination with respect to the content of the speech being limited to prohibiting disturbances by "loud and raucous noises." Those Justices sanctioning this type of regulation of "speech" distinguished it from content censorship. Justice Reed speaking for the majority, said: "When ordinances undertake censorship of speech or religious practices *before permitting their exercise* the Constitution forbids their enforcement." 336 U. S. at page 82. (Emphasis added.)

And Justice Frankfurter, concurring in the result, recognized that sound trucks could be regulated "so long as a legislature does not prescribe *what ideas may be noisily expressed and what may not be.*" 336 U. S. at page 97. (Emphasis added.)

And Justice Jackson in sustaining the ordinance emphasized that no infringement of free speech "arises unless such regulation or prohibition *undertakes to censor* the contents of the broadcasting." 336 U. S. at page 97. (Emphasis added.)

## 2. THE "SOAP BOX" ORATOR

Traditionally the "Soap Box" Orator has epitomized freedom of speech. The diverse methods employed to regulate the activities of these "orators" were reviewed by this Court in *Niemotko v. Maryland*, 340 U. S. 268; *Feiner v. New York*, 340 U. S. 315; and *Kunz v. New York*, 340 U. S. 290.<sup>28</sup> Here again, a distinction can be drawn between this Court's treatment of ordinances requiring official approval as to content and those regulating speech by some other method.

<sup>28</sup> See also *Hague v. CIO*, 307 U. S. 496, where an ordinance required a permit from the Director of Public Safety before any public meeting could be held on the streets.

In both *Niemotko* and *Kunz* it was necessary to obtain permits or licenses from governmental officials before public meetings could be held. The permits could be granted or withheld in the discretion of the official. In both instances the Court held the discretionary power of the official to control the right to speak invalid as a prior restraint on the exercise of First Amendment rights.

In the *Feiner* case, on the other hand, there was no ordinance requiring the petitioner to secure a permit or license before he made his speech, only a penal statute forbidding incitement of a breach of the peace. The Court upheld petitioner's conviction under the penal statute. The result surely would have been different if *Feiner* had been required to submit the content of his speech to police officials before mounting his "soap box."

For, clearly, one of the basic criteria in determining whether free expression of ideas may go untrammelled is "the method used to achieve such ends."

*"A licensing standard which gives an official authority to censor the content of a speech differs toto coelo from one limited by its terms or by non-discriminatory practice to considerations of public safety and the like. Again, a sanction applied after the event assures consideration of the particular circumstances of a situation. The net of control must not be cast too broadly." (Frankfurter, J., concurring in Niemotko, Kunz and Feiner, 340 U. S. at page 282. (Emphasis added.)*

### 3. SOLICITING FOR LABOR UNIONS

This Court's treatment of ordinances controlling the solicitation of members by labor union organizers emphasizes the reluctance of the Court to sanction any prior regulation of content of speech. *Thomas v. Collins*, 323 U. S. 516; *Staub v. Baxley*, 355 U. S. 313.

In the *Thomas* case a Texas statute required all labor organizers to register with and receive a card from the

Secretary of State before soliciting members. The statute did not, unlike those in previous licensing cases, vest any discretion in the issuing authorities to censor the activity. Yet a majority of this Court held that the conditioning of the exercise of the right of free speech upon even a mere registration was an invalid restriction and "quite incompatible with the requirements of the First Amendment." 323 U. S. at page 540.

And here, too, even the dissenting members of the Court, who would have upheld the validity of the Texas statute, recognized that there would be little question as to its invalidity "if the statute attempted to define a necessary qualification of an organizer; *purported to regulate what organizers might say*; limited their movements or activities; assayed to regulate time, place or purpose of meetings; or *restricted speakers in the expression of views*." 323 U. S. at page 556. (Emphasis added.)

And in *Staub v. Baxley, supra*, this Court had little difficulty with the validity of an ordinance requiring a permit from the Mayor before soliciting union members.

Justice Whittaker speaking for the majority held that "the ordinance, on its face, imposes an unconstitutional prior restraint upon the enjoyment of First Amendment freedoms and lays 'a forbidden burden upon the exercise of liberty protected by the Constitution.'"<sup>27</sup> 355 U. S. at page 325.

#### 4. BROADCASTING

With the advent of broadcasting as a new medium of communication, Congress recognized that unlike other

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<sup>27</sup> Again, even the dissenting Justices did not depart from this now well established principle. Justices Frankfurter and Clark based their dissent not on the application of First Amendment principles but on the failure of petitioners to meet certain procedural requirements.

media of expression, the air waves were not available to all, and thus by necessity broadcasting must be subject to a unified and comprehensive regulatory system of permits and licenses. *Federal Comm'n v. Broadcasting Co.*, 309 U. S. 144 (1939); *Nat. Broadcasting Co. v. U. S.*, 319 U. S. 190.

But in imposing controls upon the air waves, Congress specifically prohibited any encroachment on freedom of speech. Section 326 of the Communications Act of 1934 provides:

"Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals made by any radio station and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communications." (47 USC 326)

Some control over content of broadcasting programs does exist, but it is effected not by prior censorship, but by controls imposed subsequent to release. The distinction is clearly drawn in *Allen B. Dumont Laboratories v. Carroll*, 184 F. 2d 153 (3rd Cir. 1950), *cert. den.* 340 U. S. 929. Chief Judge Biggs in denying the Pennsylvania Board of Censors the right to censor motion pictures shown on television under the method here, which he characterized as "antique," said:

"It is clear from the foregoing that Congress was concerned with the content of the programs of all broadcasting stations including television transmitting stations, and provided exemplary penalties, including loss of license and penal sanctions for the transgressor who should broadcast an indecent or obscene program. *Congress did not intend to control in advance the broadcasting of radio programs* but it did intend to prevent the transmittal of obscene matter through the ether. Program control



was entrusted to the Federal Commission and it is an effective one." (p. 156)<sup>28</sup> (Emphasis added.)

### 5. LOBBYING

Finally, it should be noted that even with respect to the registration of lobbyists before Congress, which this Court sanctioned in *United States v. Harriss*, 347 U. S. 612, the Federal Regulation of Lobbying Act<sup>29</sup> provides only for "a modicum of information" as to the lobbyist and does not invest any power or authority in the Clerk of the House or the Secretary of the Senate to prevent the appearance of any lobbyist. Such power would clearly constitute an abridgement of the First Amendment. As the Court said in the *Harriss* case "the restraint was at most an indirect one resulting from the criminal libel laws." 347 U. S. at page 626.

Thus even in this sensitive area of vital national interest the Court has never sanctioned any regulation which required the submission and examination of speech for approval prior to its exercise but has limited its sanction to an identification statute which operates only as a deterrent.

### C. Conclusion

Governmental authorities have adopted diverse methods of regulating speech, dependent upon the medium involved and the circumstances indicating the need for regulation. The evaluation of the methods employed and the degree of control which has been permitted by this Court vary from a vitiation of mere identification requirements (e.g., *Thomas v. Collins*, *supra*; *Talley v. California*, *supra*) to a sanction of injunctive remedies against further dissemination (*Kingsley Books, Inc. v. Brown*, *supra*). In no instance, however, has any Justice of this Court sanctioned

<sup>28</sup> See also *KFKB Broadcasting Ass'n v. FRC*, 47 F. 2d 670 (D. C. Cir., 1931); *McIntire v. Wm. Penn Broadcasting Co.*, 151 F. 2d 597, 599 (3rd Cir., 1945).

<sup>29</sup> 2 U. S. C. §§ 261-270.



a regulation of speech which requires submission of all matter to a governmental official for his approval of its content prior to distribution. Such a system, in every area of speech, has been "deemed licensing or censorship," and rejected as unconstitutional wherever encountered, except up to now as to motion pictures. There such regulations have not been wholly stricken. But neither have they been sustained.

### **There is no Justifiable Basis for a Distinction in Treatment of Motion Pictures and Other Media of Communication**

For more than a decade now this Court has consistently and unanimously ruled that motion pictures are speech and part of the press and thus entitled to the immunity the Constitution grants from laws abridging the freedom of speech and press.<sup>30</sup>

Observations made in some earlier individual opinions in the Court that different media of communication might require different methods of control<sup>31</sup> were restated and

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<sup>30</sup> Since 1912 motion pictures have been entitled to copyright under the provision of the Constitution empowering Congress to promote the progress of useful arts by securing to "authors" rights in their "writings". United States Constitution Article 1, section 8, clause 8. Act of August 24, 1912, 37 Stat. 488, 17 U. S. C. 5(1)(m). See Opinion of U. S. Attorney General, December 18, 1958, upholding the policy of the Register of Copyrights for policy reasons not to screen writings, including motion pictures offered for registration, to determine whether registration should be denied on grounds of obscenity.

<sup>31</sup> See *Saia v. New York*, 334 U. S. 558, 566 (Justice Frankfurter's dissent); *Kovacs v. Cooper*, 336 U. S. 77, 96-97 (Justice Frankfurter's concurring opinion); *Kunz v. New York*, 340 U. S. 290, 307-308 (Justice Jackson's dissent). But see *Superior Films v. Department of Education* (Justice Douglas' concurring opinion):

"Motion pictures are of course a different medium of expression than the public speech, the radio, the stage, the novel, or the magazine. But the First Amendment draws no distinction between the various methods of communicating ideas." 346 U. S. at p. 589.

evaluated by Justice Clark writing for the Court in *Joseph Burstyn Inc. v. Wilson*, as follows:

"Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems. But the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule." 343 U. S. at pp. 502, 503.

Motion pictures may present their "own peculiar problems" but it is not apparent that the features of this medium are so distinguishable as to require a deviation from the long-established basic principles of freedom of speech.

The advocates of a difference in treatment usually base their arguments on the so-called "impact" of the medium, and the amount of exposure afforded motion pictures as opposed to other media. We urge that neither of these arguments has any substantial validity. The impact of motion pictures upon the individual cannot be determined with any precision. Indeed, during its investigation of juvenile delinquency, the Kefauver Committee studied the influence of motion pictures, crime comic books and television on youth and concluded:

"Exactly what the influence of the motion picture, or any mass media might be is a very complex problem about which specialists do not specifically agree. Other factors that must be taken into consideration are, firstly, that the impact of the movie depends greatly on what the personality makeup of the child already is; and secondly, that the impact must be seen in the perspective of the total environment, an environment which includes the school, the neighborhood, the gang, the church, the newspaper, the comic booklets, the radio programs, other movies, and, above all, the family."<sup>32</sup>

<sup>32</sup> Committee on the Judiciary, *Motion Pictures and Juvenile Delinquency*, S. Report No. 2055, 84th Cong., 2nd Sess. (1956), p. 62.

Nor can it be determined with any accuracy whether any one medium delivers more or less of an impact on society than another, thereby requiring a difference in treatment.<sup>33</sup>

An English study in censorship offers the following as to comparisons:

There are two further reasons for the severity of our film censorship: first, there is a commonly accepted theory that what is seen on a cinema screen is in some way more potent than what is seen in print. For the literally illiterate this is obviously true, but there is no clear evidence that the theory as applied to the greater part of the population has anything approaching absolute validity. Second, national pudency tends to apply a much stricter moral code to public entertainment, entertainment enjoyed in the mass, than to private pastimes. Because of this a man, woman or child who is debarred from seeing Marlon Brando on the rampage in the cinema is quite free to read, in domestic privacy, an obscenely angled account of similar violence and immorality in a Sunday newspaper."<sup>34</sup>

The impact of a medium is dependent to a large extent on the technical skill of the particular production (i.e., the direction, the actors, the scenery, the script) be it television, motion pictures, or drama. A technically bad motion picture may have little impact, while a well produced drama or television play, or a well written book may achieve an immeasurable impact. But, indeed, the reverse may be equally true.

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<sup>33</sup> See Alpert, *Censorship of Obscene Literature*, 52 Harv. L. Rev. 40, 72, 74; Jahoda, *The Impact of Literature: A Psychological Discussion on Some of the Assumptions in the Censorship Debate* (1954), p. 44. Cf. Kern, *Motion Pictures and the First Amendment*, 60 Yale L. J. 696, 706-708.

<sup>34</sup> Wilcox, *The Small Knife*, Sight and Sound, London, Vol. 25 (New Quarterly Series), No. 4, Spring, 1956, pp. 206, 209.

"Crime comic books" may have as great an impact on certain segments of the population as either motion pictures or television.<sup>35</sup> The impact of one medium as compared to another must differ as to each individual. It is not capable of measurement and therefore cannot form any logical basis for establishing a difference in treatment.

A second argument advanced for maintaining a distinction is the amount of exposure afforded motion pictures.<sup>36</sup> We certainly do not argue that exposure, that is, the size of the audience reached, should in any way be determinative of the operation of the First Amendment, but, even assuming the validity of the premise, the argument falls when used as a basis for maintaining a different treatment of motion pictures and other media. Television and comic books, for example, are at least as readily accessible as motion pictures. Television may be viewed without any payment; the average comic book may be purchased for ten cents, or scanned while standing in the drug store or at the newsstand. On the other hand, motion pictures can only be seen upon payment of an admission price.<sup>37</sup>

Indeed, recent studies show that exposure to television, for example, far exceeds that of other media.<sup>38</sup> In July, 1960, there were 45,760,000 television homes. It is estimated

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<sup>35</sup> See the description of the Chicago campaign against comic books in Twomey, *The Citizens' Committee and Comic Book Control: A Study of Extragovernmental Restraint*, 20 *Law and Contemporary Problems* 621. See also, *Comic Books and Juvenile Delinquency*, Interim Report of the Subcommittee to Investigate Juvenile Delinquency of the Committee on the Judiciary (84th Cong., 1st Sess. (1955)).

<sup>36</sup> It has been suggested that this factor, instead of overcoming the arguments against prior restraint, in fact, reinforces them. See Emerson, *The Doctrine of Prior Restraint*, 20 *Law and Contemporary Problems*, 648, 669.

<sup>37</sup> The average motion picture admission price is 50¢ (Film Daily Yearbook (1959), p. 105).

<sup>38</sup> See Committee on the Judiciary, *Television and Juvenile Delinquency*, S. Report No. 1466, 84th Cong., 2nd Sess. (1956), p. 5.

that each set is viewed by 3.6 persons on an average of 5.7 hours per day.<sup>39</sup> This means on an average of over 135 million people watch television daily. On the other hand, motion picture theatre attendance is estimated at 41,800,000 per week.<sup>40</sup>

Certainly it is not contended that television or any medium of communication should in any way be subjected to prior examination as to content, merely because it reaches a large number of people. It is merely urged that the argument when used to support a distinction in the treatment of motion pictures has no validity.

There are differences in media of communication. At one time, one medium may reach the greatest number of people and have the greatest impact; at another time, a different medium may find the greatest audience and have the greatest impact. But these differences cannot and do not justify any distinction in the treatment. All media must be free from any prior restraint.

This Court in *Burstyn* refrained from announcing how far its setting aside of *Mutual Film Corp. v. Ohio*, 236 U. S. 230, reached in relation to the prevention of the showing of obscene films. It cited in a footnote (343 U. S. 495, 506 fn. 20) dicta from *Near v. Minnesota*, 283 U. S. 697, 716; *Chaplinsky v. New Hampshire*, 315 U. S. 568, 571-2, and *Kovacs v. Cooper*, 336 U. S. 77, 82, which appeared to bear upon permissible or impermissible constitutional limits when "prevention" is the goal.

<sup>39</sup> "July Television Homes," Television Magazine, July, 1960, p. 74. Communication, CBS to MPA, June 1960.

<sup>40</sup> Film Daily Yearbook (1959), p. 97. In 1959 there were 31,619,000 readers of Life Magazine per issue; 35,131,000 of Readers Digest; and 23,547,000 of Saturday Evening Post, Alfred Pollitz Media Studies, *Ad-Page Exposure in Four Magazines* (1959). The newsstand sale of the paperback edition of "God's Little Acre" is estimated at 8,500,000, of "Peyton Place" at 8,000,000. (Cowley, *The Paperback Title-Fight*, The Reporter Magazine, July 7, 1960, p. 46.)

In *Kingsley Books, Inc. v. Brown*, *supra*, the Court by the narrowest of margins upheld the power of the state to prevent by court injunction the further distribution of obscene publications theretofore published. Although the majority opinion quoted the dictum from *Near*, referred to in the footnote in *Burstyn*, its reliance was not on application of the dictum but upon the demonstration that the technique for prevention by judicial process the state adopted "*studiously withholds restraint upon matters not already published and not yet found to be offensive.*" 354 U. S. at p. 445. (Emphasis added.)

The claim to freedom from Chicago's requirement that a motion picture be submitted for inspection prior to public showing will at the very least, in recognition that speech and cultural interests are involved, meet at the start with a "momentum of respect." (Justice Frankfurter concurring in *Kovacs v. Cooper*, 336 U. S. at p. 95.) And although the Court may carefully refrain from imposing what would be its own policy, as it analyzes the ordinance's operation and effect, the availability of alternative "more moderate control" deserve to be taken into account.<sup>41</sup> (Justice Frankfurter concurring in *Dennis v. United States*, 341 U. S. 494, at p. 542, quoting with approval Mr. Paul Freund's "On Understanding the Supreme Court.")

Fair inferences of what has been happening as a matter of experience under the Chicago censorship can be drawn from examination of the cases listed in Appendix C to the petition for certiorari herein. It is believed that they negate the conclusion of Judge Campbell, who dismissed the complaint herein, arrived at by him in *Zenith International Film Corp. v. Chicago*, 183 F. Supp. 623 (D. Ill., 1960), that the

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<sup>41</sup> It is common knowledge that few motion pictures exhibited in Chicago are made there. Since they are transported there by interstate carrier—railroad, motor, airplane, and the mails—the Federal Obscenity and Postal Exclusion laws apply. See 18 U. S. C. §§ 1461, 1462.



Chicago Police and City Hall censorship of motion pictures is the only feasible method of dealing with obscenity or other possible unlawfulness in motion pictures.<sup>42</sup>

Since the municipality of Chicago effectively excludes from public view within its boundaries motion pictures not already exhibited and not yet found to be offensive, the Court should find that the command of the First and Fourteenth Amendments forbids Chicago to do so.

### CONCLUSION

For the reasons advanced above, we most respectfully urge that the decision of the Court of Appeals for the Seventh Circuit be reversed and petitioner be afforded the relief requested.

Respectfully submitted,

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INC., as *Amicus Curiae*,

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<sup>42</sup> The French motion picture, *THE LOVERS*, held obscene by Judge Campbell in the *Zenith* case, seems to have been effectively dealt with by punitive action in other communities where the picture was thought to be offensively obscene. See New York Times, Nov. 28, 1959; Variety, June 15, 1960.



## APPENDIX "A"

## I. LICENSE OR PERMIT REQUIRED

<i>City</i>	<i>Ordinance Citation</i>	<i>Censoring Body</i>	<i>Standards</i>
Atlanta, Ga.	1942 Code, Sections 5-305, 58-107, 58-108, Ordinance 12/5/44	Censor and Board of Censors	"obscene or licentious" or "affect the peace, health, morals and good order"
Chicago, Ill.	Municipal Code, Sections 155-1 to 155-7	Commissioner of Police	"immoral or obscene, or portrays depravity, immorality or lack of virtue of a class of citizens of any race, color, creed or religion and exposes them to contempt, derision or obloquy, or tends to produce a breach of the peace or riots, or purports to represent any hanging, lynching or burning of a human being, it shall be the duty of the commissioner of police to refuse such permit; otherwise it shall be his duty to grant such permit."
Detroit, Mich.	Municipal Code, 1954 Chapter 89, Section 20	Commissioner or Superintendent of Police	"indecent or immoral"
Evanston, Ill. <sup>1</sup>	City Code, Article II, Sections 35-28 to 35-38	Censorship Board consisting of Mayor, Chief of Police, and members appointed by City Manager	"immoral or obscene, salacious or touches false ethics or which contains nakedness or suggestive dress, prolongs passionate love scenes or scenes making crime, drunkenness or the use of narcotics attractive or which depicts the commission of crime, the white slave traffic or resistance to police authority or scenes that are unduly horrible"
Fort Worth, Texas <sup>2</sup>	Ordinance No. 2475	Eight-member Board of Censors	"obscene, immoral, indecent or is calculated to promote or encourage racial or sectional prejudices, indecency or immorality or is reasonably calculated to corrupt the morals of youth"
Kansas City, Mo.	Revised ordinances of Kansas City, 1956, Chapter 51, Sections 51-1 to 51-1.11 as amended	Motion Picture Reviewer (appointed by Director of Welfare)	"obscene, indecent, or which tends to debase or corrupt morals or incite to crime. Within the meaning of this section, a film shall be deemed obscene or indecent when said film portrays human nudity or simulation thereof, partial nudity which is sexually immoral or offensive to public decency, dances suggesting or representing sexual actions or indecent passion or emphasizing indecent movements, lewd poses and gestures, lustful embraces, or

Atlanta, Ga.	1942 Code, Sections 5-305, 58-107, 58-108, Ordinance 12/5/44	Censor and Board of Censors	"obscene or licentious" or "affect the peace, health, morals and good order"
Chicago, Ill.	Municipal Code, Sections 155-1 to 155-7	Commissioner of Police	"immoral or obscene, or portrays depravity, immorality or lack of virtue of a class of citizens of any race, color, creed or religion and exposes them to contempt, derision or obloquy, or tends to produce a breach of the peace or riots, or purports to represent any hanging, lynching or burning of a human being, it shall be the duty of the commissioner of police to refuse such permit; otherwise it shall be his duty to grant such permit."
Detroit, Mich.	Municipal Code, 1954 Chapter 89, Section 20	Commissioner or Superintendent of Police	"indecent or immoral"
Evanston, Ill. <sup>1</sup>	City Code, Article II, Sections 35-28 to 35-38	Censorship Board consisting of Mayor, Chief of Police, and members appointed by City Manager	"immoral or obscene, salacious or touches false ethics or which contains nakedness or suggestive dress, prolongs passionate love scenes or scenes making crime, drunkenness or the use of narcotics attractive or which depicts the commission of crime, the white slave traffic or resistance to police authority or scenes that are unduly horrible"
Fort Worth, Texas <sup>2</sup>	Ordinance No. 2475	Eight-member Board of Censors	"obscene, immoral, indecent or is calculated to promote or encourage racial or sectional prejudices, indecency or immorality or is reasonably calculated to corrupt the morals of youth"
Kansas City, Mo.	Revised ordinances of Kansas City, 1956, Chapter 51, Sections 51-1 to 51-1.11 as amended	Motion Picture Reviewer (appointed by Director of Welfare)	"obscene, indecent, or which tends to debase or corrupt morals or incite to crime. Within the meaning of this section, a film shall be deemed obscene or indecent when said film portrays human nudity or simulation thereof, partial nudity which is sexually immoral or offensive to public decency, dances suggesting or representing sexual actions or indecent passion or emphasizing indecent movements, lewd poses and gestures, lustful embraces, or any other acts, representations, or expressions of erotic or pornographic nature calculated to stimulate sexual desire or lascivious thoughts; or presents acts related to sex which constitute felonies or misdemeanors under the state laws of Missouri; or presents scenes portraying sexual hygiene, sex organs, abortion, methods of contraception, venereal diseases, or scenes of actual human birth. A film shall be one that tends to debase or corrupt morals or to incite to crime when the theme or manner of presentation is of such character as to present the commission of criminal acts or contempt for law as constituting profitable, desirable, acceptable, respectable, or commonly accepted behavior, or if it advocates or teaches use of narcotics or habit-forming drugs, or portrays such use in a way to stimulate curiosity concerning such..."

## I. LICENSE OR PERMIT REQUIRED (Continued)

City	Ordinance Citation	Censoring Body	Standards
Mount Clemens, Mich. <sup>1, 4, 8</sup>	Ordinance enacted 6/1/44, recorded Book 5, Page 54	Censor appointed by City Commission	"detrimental to the public morals or not approved by the Detroit Police Department"
Pasadena, Calif.	Ordinance No. 3035 as amended 6/17/39	Three-member Board of Review	"indecent, obscene or immoral character"
Portland, Ore.	Ordinance No. 97898, Sections 16-3001 to 16-3010 (2/13/53)	Chief of Police	"indecent, immoral, obscene, suggestive, immodest or designed or tending to ferment religious, political, racial or social hatred, antagonism or detrimental to the public peace and welfare"
Providence, R. I. <sup>2, 6</sup>	City Chapter XXXII, Sections 159-171	Amusement Inspector (member of Police Force)	"obscene, impure or manifestly tending to the corruption of the morals of youth . . . lewd, wanton or lascivious"
Sacramento, Calif.	Ordinance No. 532, 12/3/31	Censor Board composed of Chief of Police and City Manager	"offensive to public morality and decency, will delineate any lewd or indecent act or any other matter or thing which is lewd, obscene or vulgar or which is of an obscene, indecent, or immoral nature or so suggestive as to be offensive to the moral sense"
San Angelo, Texas	Ordinance No. 247, 7/2/20	Six-member Board of Censors	"obscene, immoral or indecent or is calculated to promote or encourage indecency or immorality"
Waukegan, Ill. <sup>1, 4</sup>	1936 City Code, Chapter 54, Sections 587 to 596 as amended by Ordinance No. 57-0-108, 8/19/57	Seven-member Board of Censorship	motion pictures not released by "a national producing organization and passed upon by the National Preview Committee" if "indecent or lewd or obscene"
Wichita Falls, Texas <sup>5</sup>	Codified ordinances, Chapter 5, Sections 4-501 to 4-5014 (1941)	Two or more Censors of commercialized amusements (appointed by Mayor)	"calculated to corrupt the morals of youth or is indecent, low or vulgar or calculated to promote racial prejudice or create disorder or is reasonably calculated to cause a disturbance of the peace"
Winnetka, Ill. <sup>1</sup>	Winnetka Code, Art. 5, Sections 252 to 260	Village Censor	"obscene or immoral" or pictures "which portray any notorious, disorderly or any other unlawful scene or which have a tendency to disturb the peace or which depict or suggest crime, the scenes of crime or the methods of criminals"



## II. ADVANCE NOTICE REQUIRED—NO PERMIT OR LICENSE NECESSARY

<i>City</i>	<i>Ordinance Citation</i>	<i>Censoring Body</i>	<i>Advance Notice</i>	<i>Standards</i>
Birmingham, Ala.	Ordinance No. 1022 adopted 12/8/53 amending Sections 1204 to 1208 of 1944, General City Code	Chief of Police	Written notice required 24 hours prior to exhibition	"a human being (other than a babe in arms) in a nude state or condition, or, by reason of transparency of clothing or drapery in substantially nude state or condition; or in which is exhibited, shown, pictured, represented or suggested any indecent, obscene, lewd, filthy, vulgar, lascivious, or immoral act, scene, posture or matter; or in which is exhibited, shown, pictured or represented any suicide, unless shown in a flash, or any hanging, lynching or execution of a human being; or in which is exhibited, shown, pictured or represented any female in a drunken state, unless reduced to a flash, or any rape or attempt at rape, or any childbirth, or any domestic or conjugal infidelity of an immoral nature upon the part of either husband or wife, or any bawdy house or transaction therein, or the plying of the trade of a procurer, procuress, cadet or other person who profits directly from prostitution of one or more females, or the seduction or attempted seduction of any person, or immoral or unlawful sexual conduct or relations"
Gary, Ind. <sup>1, 2, 3</sup>	1949 Code, Chapter 29, Sections 26 to 36	Six-member Board of Censors	Upon demand and as far in advance as possible	"immoral, lewd or lascivious character . . . inimical to the public safety, health, morals or welfare within the city"
Lansing, Mich. <sup>1, 2</sup>	Ordinance No. 72, 12/13/15	Police and Fire Commission	Three days notice	"contrary to good order and public welfare and tends to reflect reproach upon any race or incite race hatred, race riots and which stirs up race prejudice and tends to disturb the public peace"
Memphis, Tenn.	Municipal Code, 1949, Article II, Chapter 33, Sections 943-951, City Charter, Art. IX, Sections 439-443	Five-member Board of Censors	As far in advance of intended exhibition as possible	"immoral, lewd, or lascivious, inimical to the public safety, health, morals, or welfare or denouncing, deriding or seeking to overthrow the present form of national government"
Spokane, Wash.	Ordinance No. C-2095 as amended	Commissioner of Public Safety and 12-member Reviewing Board	Fifteen Days Written Notice	"obscene and improper, licentious or immoral or which tends to incite race riots or race hatred that would have a harmful influence upon the public"
West St. Paul, Minn. <sup>5</sup>	Ordinance No. 438 approved 9/25/56	Police Commission	Seven days prior to exhibition	"immoral, obscene, lewd, or lascivious or any indecent character or which tends to create or incite race or religious prejudices or hatred of any individual creed or nationalit"

### III. NO ADVANCE NOTICE REQUIRED—REVIEW DURING REGULAR PERFORMANCE

<i>City</i>	<i>Ordinance Citation</i>	<i>Censoring Body</i>	<i>Standards</i>
Abilene, Texas <sup>2</sup>	Ordinance No. 907 passed 1 15/59	Review Board of Theatrical Entertainments	"obscene, offensive to public decency or violative of any of the laws of the State of Texas"
Bellingham, Wash.	City Code, Chapter 17.18, Sections 17.18.010 to 17.18.060	Eighteen-member Censor Board	
Bridgeport, Conn. <sup>3, 5</sup>	City Ordinances, Section 48-7, 1959 Revision	Superintendent of Police	"blasphemous, indecent or contrary to good morals"
Denver, Col. <sup>1, 3, 5</sup>	Ordinances, Article 911, Section 10	Manager of Safety and Excise	"immoral or indecent character"
Greeley, Col. <sup>1</sup>	Ordinances, Section 15-113	Chief of Police	"indecent, immoral or lewd"
Greensboro, N. C. <sup>1, 3, 5</sup>	Ordinances, Chapter 50, Sections 50.1 to 50.14, 2 17/55	Board of Public Amusement	"obscene, immoral, or objectionable"
Highland Park, Ill. <sup>1, 3, 5</sup>	Ordinance No. 687, Section 11	Chief of Police	"depicting the commission of crime . . . immoral or questionable"
Houston, Texas	1942 Code, Sections 25-2 to 25-3	Tax Assessor	"obscene, immoral, indecent, unlawful, unsanitary, unhealthy, or calculated to promote or encourage racial or sectional prejudices, obscenity, indecency, immorality, unlawfulness, unsanitary or unhealthy conditions or disturbances of the peace"
Little Rock, Ark. <sup>2</sup>	Ordinance No. 7826, Amended by ordinance Nos. 9844 and 10950, 12/27/48	15 member Censor Board	"indecent, immoral, obscene, profane, licentious, lewd, or against public morals"
New Haven, Conn. <sup>3</sup>	Ordinances, Chapter II, Sections 24 through 26	Chief of Police	"indecent or blasphemous . . . lewd, indecent or vulgar or pictorially represent the commission or the attempt to commit any crime or bodily violence"
Oklahoma City, Okla. <sup>1, 3</sup>	1948 Oklahoma City Revised Ordinances, Title 7, Sections 63 to 65	Mayor	"indecent, lewd or immoral character, . . . suggesting or depicting unlawful or forbidden crimes . . . showing or depicting any ex-convicts or convicts, outlaw or outlaws, bandit or bandits, engaged in the commission of their former crimes or in any crimes in which said ex-convicts or convicts, outlaw or outlaws, bandit or bandits, are made the feature of said show"

## III. NO ADVANCE NOTICE REQUIRED—REVIEW DURING REGULAR PERFORMANCE (Continued)

<i>City</i>	<i>Ordinance Citation</i>	<i>Censoring Body</i>	<i>Standards</i>
Palo Alto, Calif. <sup>2</sup>	Ordinance No. 1277, Administrative Code, Section 253, and Ordinance No. 5, Sections 15.01, 15.03	Board of Commercial Amusements	"to be of obscene, indecent or immoral nature or presents any gruesome, revolting or disgusting scenes of subjects or tends to disturb the public peace or tends to corrupt the public morals"
Rockford, Ill. <sup>1, 2</sup>	City Code, Chapter 5, Article I, Sections 5-1 to 5-7	Censorship Committee consisting of the Mayor, Chief of Police and a member of the City Council	"immoral or obscene, salacious or touches false ethics or which contains nakedness or suggestive dress, prolongs passionate love scenes or scenes making crime, drunkenness or the use of narcotics attractive or which depicts the commission of crime, the white slave traffic or resistance to police authority or scenes that are unduly horrible"
San Diego, Calif. <sup>4, 5</sup>	Ordinance No. 3682, Sections 16.01 to 16.05, 3/9/48	Director of Social Welfare	None
Seattle, Wash.	Ordinance No. 83099, Sections 1-7 (6/1/54) as amended by Ordinance No. 8512 (9/5/56)	Thirteen-member Board of Theatre Supervisors	"obscene, indecent, or immoral nature or character; or wherein any scene of violence is shown or presented in a gruesome or revolting manner, or in a manner which tends to corrupt morals or which is offensive to the moral sense"
Sioux City, Iowa <sup>2, 5</sup>	Chapter 143, Sections 143-5 to 143-6	Mayor, City Manager, Chief of Police or any member of City Council	"depicting illegal acts, burglaries, safe-cracking, hold-ups, stagecoach or train robberies, or acts of immoral or indecent nature"
Tacoma, Wash. <sup>1</sup>	City Code, Chapter 8.32, Sections 8.32.010 to 8.32.090	Five-member Board of Censors	"immoral, obscene, lewd, lascivious, suggestive or of any indecent character; or which shall tend to exert a harmful influence upon public morals; or which tends to glorify crime; or which portrays brutality; or which shall tend to disturb the public peace"
Trenton, N. J. <sup>1</sup>	Article 12, Sections 15-118 to 15-122	Director of Public Safety	"offense against public decency or morals... objectionable from a moral standpoint or is likely to create public disorder"
Waco, Texas <sup>1</sup>	City Charter, Article 281	Board of Commissioners	"indecent, immoral or calculated to affect injuriously the morals of the people"

<sup>1</sup> Inactive.<sup>2</sup> Reviews all pictures.<sup>3</sup> Reviews on complaint only.<sup>4</sup> Reviews only pictures not containing M.P.A. seal or a approval of other reviewing organization.<sup>5</sup> Theatre license may be revoked for violation.<sup>6</sup> License issued weekly for purpose of exhibiting motion pictures in general and not for particular motion picture but may be refused if motion picture to be exhibited is objectionable.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1959.

No. ~~100~~ 34

**TIMES FILM CORPORATION,**

*Petitioner,*

*vs.*

**CITY OF CHICAGO, ET AL**

*Respondents.*

**MOTION FOR LEAVE TO FILE ATTACHED BRIEF  
OF AMERICAN CIVIL LIBERTIES UNION  
AS AMICUS CURIAE.**

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## INDEX.

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	PAGE
Motion for Leave to File Brief as Amicus Curiae....	i
Table of Cases Cited.....	ii
Table of Miscellaneous Works Cited.....	iii
Table of Periodicals Cited.....	iv
Table of Statutes Cited.....	iv
Table of Texts Cited.....	iv
Interest of Amicus.....	1
Argument:	
I. History Shows That Censorship Systems Are Forbidden by the First and Fourteenth Amend- ments.....	4
II. Motion Pictures Are Protected Against Censor- ship to the Same Extent as Other Media of Communication .....	8
III. The Type of Censorship System Involved in This Case Imposes a Substantial Restraint on Protected Expression .....	10
Conclusion .....	16
Appendix A.....	17a

TABLE OF CASES CITED.

American Civil Liberties Union v. City of Chicago, 3 Ill. 2d 344 (1955).....	14
Block v. City of Chicago, 239 Ill. 251 (1909).....	14
Burstyn v. Wilson, 343 U. S. 495 (1952).....	8, 13, 14
Butler v. Michigan, 252 U. S. 380 (1957).....	14
Cantwell v. Connecticut, 310 U. S. 296 (1939).....	7
Capitol Enterprises v. City of Chicago, 260 F. 2d 670 (C. A. 7, 1958).....	14
Columbia Pictures Corporation v. City of Chicago, N. D. Ill., 59 C 1058 (1960) (unreported).....	14
Commercial Pictures Corporation v. Board of Regents, 346 U. S. 587 (1954).....	14
De Jonge v. Oregon, 299 U. S. 353 (1937).....	14
Elkins v. U. S., 80 S. Ct. 1437 (1960).....	7
Excelsior Pictures Corporation v. City of Chicago, 182 F. Supp. 400 (N. D. Ill., 1960).....	14
Gelling v. Texas, 343 U. S. 960 (1952).....	14
Grosjean v. American Press Co., 297 U. S. 233 (1938)	7
Hague v. C. I. O., 307 U. S. 496 (1939).....	7
Holmby v. Vaughn, 350 U. S. 870 (1955).....	14
Joseph Burstyn, Inc. v. Brown, 303 N. Y. 242, 101 N. E. 2d 665 (1951).....	7, 8
Kingsley Books, Inc. v. Brown, 1 N. Y. 2d 177 (1956), affd., 354 U. S. 436 (1957).....	7, 10
Kingsley Pictures Corporation v. Regents, 360 U. S. 684 (1959) ;.....	7
Kunz v. New York, 340 U. S. 290 (1951).....	7
Lovell v. City of Griffin, 303 U. S. 444 (1938).....	7

McNabb v. United States, 318 U. S. 332 (1943).....	10
Murdock v. Pennsylvania, 319 U. S. 105 (1942).....	7
Near v. Minnesota, 283 U. S. 697 (1931).....	6, 7, 9
Niemotko v. Maryland, 340 U. S. 268 (1951).....	7
Paramount Films v. City of Chicago, 172 F. Supp. 69 (N. D. Ill., 1959).....	14
Patterson v. Colorado, 205 U. S. 454 (1907).....	6
Schneider v. State, 308 U. S. 147 (1939).....	7
Smith v. California, 361 U. S. 147 (1959).....	13, 15
Superior Pictures Corporation v. Department of Edu- cation, 346 U. S. 587 (1954).....	14
Times Film Corporation v. City of Chicago, N. D. Ill., 57 C 2017 (1957), (unreported).....	14
Times Film Corporation v. City of Chicago, 355 U. S. 35 (1957).....	13, 14
United Artists Corporation, v. Thompson, 339 Ill. 595 (1930).....	14
Winters v. New York, 333 U. S. 507 (1946).....	7
Woodfall's case, 20 Howell's State Trials 903 (1770)..<	6
Zenith International Film Corporation v. City of Chi- cago, 183 F. Supp. 623 (N. D. Ill., 1960).....	14

#### TABLE OF MISCELLANEOUS WORKS CITED.

Anonymous, <i>Arguments Relating to a Restraint Upon the Press</i> , (London, 1712).....	4
<i>Encyclopedia Americana</i> , Vol. 6 (1956).....	2
Milton, John; <i>Areopagitica, The Complete Poetry and Selected Prose of John Milton</i> , (Modern Library Edi- tion, 1950).....	11
Official Opinions of the Attorney General of the United States, Vol. I (Hall, Ed.; Washington, 1852).....	6

this and other courts involving freedom of communication and the problem of motion picture censorship in particular. The definitive state court interpretation of the ordinance involved in this case resulted from litigation commenced by movant as party plaintiff. See *American Civil Liberties Union v. City of Chicago*, 3 Ill. 2d 133 (1954), *appeal dismissed for want of a final judgment*, 348 U. S. 979 (1955), later decision, 13 Ill. App. 2d 278 (1957). The instant case is considered by movant to be the most important case involving governmental censorship since *Near v. Minnesota*, 383 U. S. 697 (1931).

2. The central issue in this case is whether or not the Constitution permits states or municipalities to impose restraints on motion pictures which would clearly not be permissible if imposed on other media of communication. The answer to this question must be sought, at least in part, in the historical context out of which grew the freedom of communication guaranteed by the First and Fourteenth Amendments. Movant's brief seeks to relate this historical context to the issues in this case.

3. The presentation in movants' brief does not repeat the material contained in petitioner's brief.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1939.

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**No. 689.**

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**TIMES FILM CORPORATION,**

*Petitioner,*

*vs.*

**CITY OF CHICAGO, ET AL.,**

*Respondents.*

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**BRIEF OF AMERICAN CIVIL LIBERTIES UNION  
AS AMICUS CURIAE.**

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**INTEREST OF AMICUS.**

The American Civil Liberties Union is dedicated to the preservation and advancement of the basic liberties of a free society. Amicus believes that the censorship ordinance attacked in this case unconstitutionally limits freedom of expression in an important medium of communication.

The sole issue to which this brief is addressed is the validity under the First and Fourteenth Amendments to the United States Constitution of those provisions of Chapter 155 of the Municipal Code of Chicago<sup>1</sup> which require the issuance of a permit from the Commissioner of Police prior to the exhibition within the City of any motion picture. Section 4 of the ordinance instructs the commissioner that

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1. The full text of the relevant sections of the ordinance is set forth in Appendix A to this brief.

"Such permit shall be granted only after the motion picture film for which said permit is requested has been produced at the office of the commissioner of police for examination or censorship."

After examination of the submitted motion picture, the commissioner is required to refuse a permit if the motion picture

"is immoral or obscene, or portrays depravity, criminality, or lack of virtue of a class of citizens of any race, color, creed, or religion and exposes them to contempt, derision, or obloquy, or tends to produce a breach of the peace or riots, or purports to represent any hanging, lynching or burning of a human being  
• • •"

The City of Chicago has thus subjected motion pictures to a type of censorship system,<sup>2</sup> traditionally abhorrent to a free people. No motion picture may be shown within the City unless the censor, after viewing the film, determines, in an *ex parte* proceeding, that its contents are suitable for viewing by the public.

The American Civil Liberties Union, as *amicus curiae*, does not, in this proceeding, challenge the right of the City of Chicago to punish the publication of motion pictures, books, newspapers, periodicals, or any other form of communication the contents of which violate legally acceptable standards. It does challenge the power of the City, or any other

2. "In a strict sense censorship is the term applied to the operations of a person authorized to intervene between a producer of publishable material and the consumers to whom he offers that material and to prohibit either the producer from publishing or the consumer from • • • acquiring knowledge of whatever part of such material the censor deems unsuitable." 6 *Encyclopedia Americana* 193a (1956).

"Official censorship systems for motion pictures, requiring advance approval before a film can be shown, represent what is probably the closest approach in America today to the English licensing laws of the seventeenth century • • • Obviously, censorship in this field is prior restraint in its classical form." Emerson, *The Doctrine of Prior Restraint*, 20 *Law and Contemporary Problems* 648 at 667 (1955).

governmental body subject to the limitations imposed by the First or Fourteenth Amendments, to enact a law requiring the advance submission of motion pictures (or any other form of communication) to a censor empowered to prevent publication if the submitted material is deemed objectionable.

Although this Court has never directly passed upon the constitutionality of motion picture censorship, its decisions in closely related areas combine with history to make clear that no state or municipality may, consistently with the Fourteenth Amendment, interpose a censor between the public and those who would communicate with it.



## ARGUMENT.

### I. HISTORY SHOWS THAT CENSORSHIP SYSTEMS ARE FORBIDDEN BY THE FIRST AND FOURTEENTH AMENDMENTS.

As early as 1275 Parliament outlawed "any false news or tales whereby discord or occasion of discord or slander may grow between the king or his people or the great men of the realm, \* \* \*" but it was not until the invention of printing that a general censorship law was put into effect. See Levy, *Legacy of Suppression* 7-8 (Cambridge, 1960). The relationship between the advent of printing and the emergence of censorship was, of course, not coincidental.

"\* \* \* Governments at first thought it absolutely necessary to appoint a censor, in order to watch over the beginning of all writings and permit such only to be published as he should think proper. This notion was founded on the simple faith that books were like gunpowder or poison, which if once made, the mischief might be irreparable." Paterson, *Liberty of the Press, Speech & Public Worship*, 50 (London, 1880).

Because of the seemingly dangerous potential of the printing press, founded upon the far from unreasonable belief that the printed word might work more mischief than the spoken or written word,<sup>3</sup> censorship prevailed in England

3. "The Moralists observe, that there is a natural Bashfulness, in the most flagitious Sinners, which restrains 'em generally from talking (before modest people especially) the worst Things they think.

"Whereas a Printed Book never blushes, nor the Author, if his name be not to it, but, like a Boy that hath flung a Cracker out of a Garrett Window, Pops in his head, and laughs only at the Conceit of what Mischief it may do."

*Arguments Relating to a Restraint Upon the Press, fully and fairly handled in a Letter to a Benchet from a Young Gentleman of the Temple* (London, printed for R. & F. Bonwicke at Red Lion Inn, St. Paul's Churchyard, 1712).

for more than one hundred fifty years. In America also, licensing of printing presses, including a ban upon publication prior to submission to and approval by a censor, was common. See Levy, *Legacy of Suppression*, *supra*, 8-49.

By 1694, however, sentiment had turned so strongly against censorship that Parliament refused to renew the licensing law which expired that year. See 4 Blackstone's Commentaries 152, note a (7th Ed., 1775). And, within the next thirty years, censorship passed also from the American scene. See Levy, *Legacy of Suppression*, *supra*, 18-87.

With the advancement of liberal thought during the eighteenth century, freedom from censorship was widely hailed as the fundamental and necessary condition of a free press. Blackstone wrote that:

"The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press . . . to subject the press to the restrictive power of a licenser, as was formerly done, both before and since the revolutions, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. But to punish (as the law does at present) any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty. Thus the will of individuals is still left free . . . And to this we may add, that the only plausible argument heretofore used for restraining the just freedom of the press, 'that it was necessary, to prevent the daily abuse of it,' will entirely lose its force,

when it is shown (by a reasonable exertion of the laws) that the press cannot be abused to any bad purpose, without incurring a suitable punishment: whereas it can never be used to any good one, when under the control of an inspector." *Op. cit. supra*, at 151-53.

See also the comments of Lord Mansfield, in *Woodfall's Case*, 20 Howell's State Trials 903, 911 (1770).

It would unduly lengthen this brief to refer to the abundant evidence available to show that Blackstone's views were known and shared in the colonies. See Levy, *Legacy of Suppression, supra*, 18-87. Typical of the colonists' views, however, is that expressed in the charge of Chief Justice Hutchinson of Massachusetts in a prosecution for seditious libel during the year 1767:

"The Liberty of the Press is doubtless a very great Blessing; but this liberty means no more than a Freedom for every Thing to pass from the Press without License—That is, you shall not be obliged to obtain a license from any Authority before the Emission of Things from the Press." *Id.* at 68.

That these views were shared by the members of the First Congress and the state legislatures which adopted the First Amendment seems hardly open to question. In the context of the times it is inconceivable that the words "Congress shall make no law . . . abridging the freedom . . . of the press. . . ." could have meant anything less than that Congress was to be absolutely prohibited from establishing a system of censorship. See *Near v. Minnesota*, 283 U. S. 697 (1931); *Patterson v. Colorado*, 205 U. S. 454, 462 (1907); 1 Official Opinions of the Attorneys General of the United States 72 (Hall, Ed.; Washington, 1852).

The present case, of course, does not arise under the First Amendment, but under the Fourteenth. Nevertheless, whether or not the free speech and press guarantees of the First Amendment are incorporated in the Fourteenth,

cf. *Elkins v. United States*, 80 S. Ct. 1437 (1960); *Kingsley Pictures Corp. v. Regents*, 360 U. S. 684 (1959), the historical context in which the American conception of freedom was developed is peculiarly relevant to any inquiry as to the scope of the Fourteenth Amendment. As Chief Justice Hughes said:

“Liberty, in each of its phases, has its historical connotation and, in the present instance, the inquiry is as to the historic conception of the liberty of the press and whether the statute under review violates the essential attributes of that liberty. \* \* \*

“The question is whether a statute authorizing such proceedings in restraint of publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed. In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication.” *Near v. Minnesota*, *supra*, at 708, 713.

Since its decision in *Near*, this Court has handed down numerous decisions recognizing and applying, in a variety of contexts, the Fourteenth Amendment’s prohibition against censorship.<sup>4</sup> In no case has it sanctioned exercise by the state of a power which may fairly be deemed the equivalent of that of the censor. Only recently, in *Kingsley Books, Inc. v. Brown*, 354 U. S. 436, 437 (1957), the Court, in upholding a New York statute authorizing “a limited injunctive remedy” against obscene books *subsequent to*

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4. See *Grosjean v. American Press Co.*, 297 U. S. 233 (1936); *Lovell v. City of Griffin*, 303 U. S. 444 (1938); *Hague v. C.I.O.*, 307 U. S. 496 (1939); *Schneider v. State*, 308 U. S. 147 (1939); *Cantwell v. Connecticut*, 310 U. S. 296 (1939); *Murdock v. Pennsylvania*, 319 U. S. 105 (1942); *Winters v. New York*, 333 U. S. 507 (1946); *Niemotko v. Maryland*, 340 U. S. 268 (1951); *Kunz v. New York*, 340 U. S. 290 (1951).

their publication, was careful to point out that its decision was "confined so as to preclude what may fairly be deemed licensing or censorship." Id. at 441.

## II. MOTION PICTURES ARE PROTECTED AGAINST CENSORSHIP TO THE SAME EXTENT AS OTHER MEDIA OF COMMUNICATION.

In *Burstyn v. Wilson*, 343 U. S. 495, 502 (1952), this Court squarely held that

"expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments."

For the reasons stated above it would appear that the Chicago censorship ordinance is invalid, for it subjects a protected means of communication, motion pictures, to the heavy hand of the censor.

It has been suggested, however, that motion pictures create problems not presented by other media of communication, problems which were not, and could not have been foreseen by the framers, and that, for this reason, legislative controls may be exercised with respect to motion pictures which would be patently invalid if applied to older means of communication. See, e.g., *Joseph Burstyn, Inc. v. Wilson*, 303 N. Y. 242, 261, 101 N. E. 2d 665, 674 (1951). These arguments were noted by this Court in *Burstyn v. Wilson*, *supra*, at 502 with the comment that any unique problems posed by motion pictures might "be relevant in determining the permissible scope of community control . . . ." There are, of course, subjects possible to imagine which may be described inoffensively by the printed word which would be offensive if displayed upon the motion picture screen. The differences between motion pictures and the older media of communication do not, however, justify subjecting the former to a system of

control which for three centuries has been generally condemned as obnoxious to free men.

Ultimately, all arguments which seek to justify motion picture censorship rest upon the premise that motion pictures have a greater "capacity for evil" than do the older media of communication. The argument is hardly a novel one. It was, as we have seen, precisely this justification which was given for the censorship of the press during the sixteenth and seventeenth centuries. Then, as now, it was urged that problems were presented by the newer medium of communication which made it more dangerous to a well ordered society than the older media had been. The plain fact, however, is that every medium of communication is dangerous. To be sure; speech, printed matter, motion pictures, indeed all forms of communication may be used for evil purposes. Nonetheless, the type of censorship involved in this case is at war with the fundamental guarantees of freedom which have been incorporated into our Constitution.

The sum of the arguments for censorship is no different now than it was three hundred years ago—that a system of prior restraint is the most efficient means available for the suppression of objectionable matter. But history reveals that this nation, without equivocation, chose long ago to forego such means in order to assure full opportunity for lawful expression. Madison pointed out long ago that,

"Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the States, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits." Quoted in *Near v. Minnesota*, 283 U. S. 691, 718 (1931).



Only by ignoring that history as it is written into our Constitution can the validity of the Chicago ordinance be sustained.

### III. THE TYPE OF CENSORSHIP SYSTEM INVOLVED IN THIS CASE IMPOSES A SUBSTANTIAL RESTRAINT ON PROTECTED EXPRESSION.

If the passage of three centuries has not altered the arguments of the proponents of censorship, neither has it weakened the force of the objections to censorship—objections which have been expressed at least since the time of Milton and which were well known to the Founders of this nation.

The spirit which underlies the Constitution recognizes that sound procedure is essential to a free nation.<sup>5</sup> Yet, in a society devoted to freedom of thought and expression, censorship is, as the Founders were aware, the most dangerous of procedures. The inevitable consequence of a system of censorship is to impose serious restraints upon the exhibition of constitutionally protected motion pictures. The function which the motion picture censor performs, the pressures to which he is subject, and the procedures under which he operates all militate against the full and free exchange of views which the First and Fourteenth Amendments seek to promote. They lead to the exclusion of any motion picture which may be objectionable either to the censor or to the myriad of pressure groups whose influence is felt in this area. See Emerson, *The Doctrine of Prior Restraint*, 30 *Law & Contemporary Problems*, 648, 656-660 (1955), *supra*.

Subsequent restraints such as criminal prosecutions or the "limited injunctive remedy, under closely defined procedural safeguards," upheld in *Kingsley Books, Inc. v. Brown*, *supra*, 354 U. S. 436, are aimed with selectivity

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5. See *McNabb v. U. S.*, 318 U. S. 332, 347 (1943).



at arguably unlawful matter.<sup>6</sup> Only those motion pictures which are the subject of complaint or otherwise come to the attention of the prosecutor are subjected to governmental scrutiny. A system of censorship, in contrast, lumps together the unlawful and the constitutionally protected, and subjects both to procedures alien to our law and designed more for suppression than for promotion of the great debate so essential to our society.

It is not merely the character or ability of those who would serve as censor which leads to the absurd results reached under the Chicago ordinance, see note 10 *infra*, although Milton made clear long-ago that it was hardly to be expected that censors would be of the character and ability demanded by their task:

"If he [the censor] be of such worth as behooves him, there cannot be a more tedious and displeasing journey-work, a greater loss of time levied upon his head, than to be made the perpetual reader of unchosen books and pamphlets \* \* \* we may easily foresee what kind of licenser we are to expect hereafter, either ignorant, imperious, and remiss or basely pecuniary." *Areopagitica, in the Complete Poetry and Selected Prose of John Milton*, 677 at 700. (Modern Library Ed. 1950).

Personal qualifications aside, the tendency of the censor to be overcautious, to prohibit the exhibition of anything which might arouse controversy is inherent in the office which he occupies. This danger also was recognized long ago:

"though a licenser should happen to be judicious more than the ordinary, which will be a great jeopardy of the next succession, yet his very office enjoins him to let nothing pass but what is vulgarly received already." *Id.*, at 703.

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6. See opinion of Judge Fuld in Court below, 1 N. Y. 2d 177, 185-6 (1956).

The function of a censor, after all, is to suppress. Absent any matter to suppress, the need for the office disappears. The nature of the office, moreover, subjects it to pressures from those who have created it—not those who, closer to our constitutional tradition, believe in unfettered expression, but those who believe that there are subjects which ought not to be before the public.

Dangers to free expression to some extent inhere in any system designed to control the dissemination of ideas even after they are expressed. But they are particularly intensified in a system of prior censorship. By a stroke of the pen the licenser may deny the right of exhibition. Only at the price of initiating extensive and time-consuming litigation may the motion picture producer or exhibitor challenge the censor's decree. The burden is thus placed upon the citizen to go forward and justify his right to be heard, rather than, as in the case of criminal prosecutions, upon the government to establish that reasons exist which are sufficiently compelling to require proscription.

Important also are the procedural safeguards present in judicial proceedings to punish or restrain which are totally absent in "proceedings" before the censor. If freedom of expression is to be placed on trial, it is at least, as Blackstone suggested, *supra*, p. 5, entitled to one that is fair and impartial. Yet, for the reasons discussed above, the nature of the censor's office invites arbitrary decisions. Any decision as to the lawfulness of the motion picture is made not by a jury familiar with community standards and less subject to the influence of particular pressure groups, nor by a judge trained in our constitutional ideals but by one whose *raison d'être* is to suppress.

Unlike the procedures in a courtroom during a criminal or injunctive proceeding, those of the censor serve only to increase the risk of an irresponsible decision. The censor, unaffected by the presumption of innocence, unhampered

by the rules of evidence, and not subject to the discipline of having to justify his decisions, tends to become a law unto himself. There is, moreover, no opportunity for the applicant or anyone on his behalf to present any evidence bearing upon the factual questions determinative of whether or not the motion picture is constitutionally protected.<sup>7</sup> Cf. *Smith v. California*, 361 U. S., 147, 160, 169 (1959), concurring opinions of Mr. Justice Frankfurter and Mr. Justice Harlan. The censor thus determines in a vacuum what is appropriate for the public to hear and to see. The standards applied, consequently, must of necessity tend to be the personal standards of the censor or some pressure group, rather than those which this Court has held permissible. For these reasons, as Blackstone pointed out long ago, "(T)o subject the press to the restrictive power of licenser . . . is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government." *Supra*, pp. 152-3.

Experience under the Chicago ordinance more than adequately demonstrates the wisdom of the framers in forbidding censorship. The petition for the writ of certiorari in this case discloses that in the years between the decision of the Court in *Burstyn v. Wilson*, *supra*, and the filing of the petition not once has the City been upheld by

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7. The absence of any such opportunity under the Chicago ordinance involved here appears in the record before this Court in earlier litigation between the parties to the present proceeding. *Times Film Corporation v. City of Chicago*, 355 U. S. 35 (1957), Transcript of Record, p. 51, Oct. Term 1957, No. 372 (Trans. of Rec. in Ct. of App., p. 51). The record in that case, consisting largely of testimony of those who administer the ordinance, constitutes an invaluable study of the actual operation of the Chicago ordinance over a number of years, including testimony as to qualifications of the censors, the "standards" which they apply in reaching their decisions; and the procedures which they employ. It speaks more eloquently than could any brief of the dangers of censorship to a free society.

the Courts in its refusal to grant a permit for the exhibition of a motion picture.<sup>8</sup>

The absurdities to which the system leads are exemplified by a recent case under which the City refused a permit for the exhibition of the motion picture "Anatomy of a Murder" based upon the best-selling novel of the same title, because it found the use of the words "rape" and "contraceptive" to be objectionable. *Columbia Pictures Corp. v. City of Chicago*, N. D. Ill., 59 C 1058 (1959) (unreported).<sup>9</sup> Other examples of the inability of the Chicago censors<sup>10</sup>

8. Petition, Appendix C, pp. 13a-14a. The cases are: *American Civil Liberties Union v. City of Chicago*, 13 Ill. App. 2d 278 (1957); *Times Film Corporation v. City of Chicago*, 355 U. S. 35 (1957); *Times Film Corporation v. City of Chicago*, N. D. Ill. 57 C 2017 (1957) (unreported); *Paramount Films v. City of Chicago*, 172 F. Supp. 69 (N. D. Ill. 1959); *Capitol Enterprises v. City of Chicago*, 260 F. 2d 670 (C. A. 7, 1958); and *Columbia Pictures Corp. v. City of Chicago*, N. D. Ill., 59 C 1058 (1959) (unreported).

Two cases have subsequently been decided. In *Excelsior Pictures Corp. v. City of Chicago*, 182 F. Supp. 400 (N. D. Ill., 1960), the court ordered the city to grant a license. In *Zenith International Film Corp. v. City of Chicago*, 183 F. Supp. 623 (N. D. Ill., 1960), the denial of a license was upheld. An appeal is pending. C. A. 7, No. 13008.

9. See memorandum of Miner, D.J., and *Chicago Tribune*, July 9, 1959, part 4, p. 11, col. 2.

10. See note 8 *supra*. The litigious history of Chicago movie censorship commenced with the banning of "The James Boys." *Block v. City of Chicago*, 239 Ill. 251 (1909). In *United Artists Corp. v. Thompson*, 339 Ill. 595 (1930), the police censor board denied a license because the film portrayed illegal and brutal police practices. The Chicago censors have banned newsreel films of Chicago policemen shooting at labor pickets and ordered the deletion of a scene depicting the birth of a buffalo in Walt Disney's "Vanishing Prairie." Gavzer, *Who Censors Our Movies?*, *Chicago Magazine*, Feb., 1956, pp. 35, 39. Before World War II licenses were denied to a number of films portraying and criticizing life in Nazi Germany including the March of Time's "Inside Nazi Germany." Editorials, *Chicago Daily Times*, Jan. 29, Nov. 18, 1938.

A member of the Chicago censor board explained that she rejected a film because "it was immoral, corrupt, indecent, against my—against my (sic) religious principles \* \* \*" Transcript of Record/

and those of other jurisdictions<sup>11</sup> to keep within constitutional bounds are familiar.

The lessons of history have thus been confirmed. In an effort to prevent exhibition of particular types of motion pictures, the city of Chicago has imposed a restraint which is forbidden by the Constitution. Here, as in *Smith v. California, supra*,

"the ordinance in question, though aimed at obscene matter, has such a tendency to inhibit constitutionally protected expression that it cannot stand under the Constitution."

---

*Times Film Corp. v. City of Chicago*, 355 U. S. 35, *supra*, p. 172. Cf. *Burstyn v. Wilson, supra*. More recently, a police sergeant attached to the censor board explained, "Coarse language or anything that would be derogatory to the (U. S.) government—propaganda" is ruled out of foreign films. "Nothing pink or red is allowed," he added. *Chicago Daily News*, April 7, 1959, p. 3, col. 7-8. Cf. *DeJonge v. Oregon*, 299 U. S. 353 (1937). The police sergeant in charge of the censor unit has said: "Children should be allowed to see any movie that plays in Chicago. If a picture is objectionable for a child, it is objectionable period." *Chicago Tribune*, May 24, 1959, p. 8, col. 3. Cf. *Butler v. Michigan*, 352 U. S. 380 (1957).

11. See *Burstyn v. Wilson, supra*; *Gelling v. Texas*, 343 U. S. 960 (1952); *Commercial Pictures Corp. v. Board of Regents*, 346 U. S. 587 (1954); *Superior Pictures Corp. v. Department of Education*, 346 U. S. 587 (1954); *Holmby v. Vaughn*, 350 U. S. 870 (1955); *Times Film Corporation v. City of Chicago*, 355 U. S. 35 (1957). See also Kupferman and O'Brien, "Motion Picture Censorship—The Memphis Blues," 36 Cornell L. Q. 273 (1951).

**CONCLUSION.**

We respectfully submit that the judgment of the courts below should be reversed.

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JOEL J. SPRAYREGEN,  
BERNARD WEISBERG,  
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WILLIAM G. HALBY,  
ROWLAND WATTS,  
*Of Counsel.*

**APPENDIX A.****Relevant Portions of Municipal Code of Chicago****Chapter 155.****Motion Pictures.****Exhibition.**

155-1. It shall be unlawful for any person to show or exhibit in a public place, or in a place where the public is admitted, anywhere in the city any picture or series of pictures of the classes or kinds commonly shown in mutoscopes, kinetoscopes, or cinematographs, and such pictures or series of pictures as are commonly shown or exhibited in so-called penny arcades, and in all other automatic or motion picture devices, whether an admission fee is charged or not, without first having secured a permit therefor from the commissioner of police.

It shall be unlawful for any person to lease or transfer, or otherwise put into circulation any motion picture plates, films, rolls, or other like articles or apparatus, from which a series of pictures for public exhibition can be produced, to any exhibitor of motion pictures, for the purpose of exhibition within the city, without first having secured a permit therefor from the commissioner of police.

The permit herein required shall be obtained for each and every picture or series of pictures exhibited and is in addition to any license or other imposition required by law or other provision of this code.

Any person exhibiting any pictures or series of pictures without a permit having been obtained therefor shall



*Appendix A.**Relevant Portions of Municipal Code of Chicago.*

be fined not less than fifty dollars nor more than one hundred dollars for each offense. A separate and distinct offense shall be regarded as having been committed for each day's exhibition of each picture or series of pictures without a permit. (Amend. Coun. J. 12-21-39, p. 1396).

155-4. Such permit shall be granted only after the motion picture film for which said permit is requested has been produced at the office of the commissioner of police for examination or censorship.

If a picture or series of pictures, for the showing or exhibition of which an application for a permit is made, is immoral or obscene, or portrays depravity, criminality, or lack of virtue of a class of citizens of any race, color, creed, or religion and exposes them to contempt, derision, or obloquy, or tends to produce a breach of the peace or riots, or purports to represent any hanging, lynching, or burning of a human being, it shall be the duty of the commissioner of police to refuse such permit; otherwise it shall be his duty to grant such permit.

In case the commissioner of police shall refuse to grant a permit as hereinbefore provided, the applicant for the same may appeal to the mayor. Such appeal shall be presented in the same manner as the original application to the commissioner of police. The action of the mayor on any application for a permit shall be final.

155-5. In all cases where a permit for the exhibition of a picture or series of pictures has been refused under the provisions of the preceding section because the same tends towards creating a harmful impression on the mind of children, where such tendency as to the minds of adults would not exist if exhibited only to persons of mature age,

*Appendix A.**Relevant Portions of Municipal Code of Chicago.*

the commissioner of police may grant a special permit limiting the exhibition of such picture or series of pictures to persons over the age of twenty-one years; provided, such picture or pictures are not of such character as to tend to create contempt or hatred for any class of law abiding citizens.

When such special permit has been issued, it shall be unlawful for any person exhibiting said picture to allow any persons under the age of twenty-one years to enter the place where same is being exhibited or to remain in said place while any part of said picture or series of pictures is being shown.

IN THE  
**Supreme Court of the United States**

**OCTOBER TERM, 1960**

**No. 34**

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**TIMES FILM CORPORATION,**

*Petitioner,*

v.

**CITY OF CHICAGO, RICHARD J. DALEY and  
TIMOTHY J. O'CONNOR,**

*Respondents.*

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**PETITION FOR REHEARING**

It would appear from reading the majority opinion that the Court has decided a question other than the one which Petitioner sought to bring before this Court. For this reason, Petitioner respectfully requests a rehearing.

Petitioner has never contended that it is entitled to show, even once, "pornography, incitement to riot or forceful overthrow of orderly government." Nor has it claimed "complete and absolute freedom to exhibit at least once any and every kind of motion picture." In our Petition for Certiorari, we stated the question as whether those provisions of the Chicago licensing ordinance which provide for censorship of *all* motion pictures prior to their exhibition are unconstitutional under the First and Fourteenth Amendments. It was

so stated in our Brief on the merits. During oral argument the following colloquy took place.

"Justice Whittaker: That would be to say then, if I understand you, that never could pornography or obscenity be enjoined, its publications and distribution.

Mr. Bilgrey: That is not what I conceive this question to be, Justice Whittaker. I don't think this to be the question, Justice Whittaker. I don't think that the question before this Court is that even if we were to concede that this motion picture is obscene, whether we would have the right to initially show it. I think that is a completely different question which, I don't know if it has ever been decided or come out in that precise posture."

\* \* \* \*

"Justice Whittaker: I am asking you if by this very suit you are not asking the City to issue a license to show the film, whether or not it is obscene.

Mr. Mikva: Whether or not it is obscene because there is no reason to assume that it is obscene.

Justice Whittaker: Well, is there a reason to assume that it is not?

Mr. Mikva: No, and, therefore, it is the same thing as a printing press or any other form of communication. You make no assumption about it. It is up to the City and the State to come forward with pretty convincing proof that this falls within one of the exceptional areas.

Justice Frankfurter: Are you now saying that what all this ruckus is about is the presumption

that your film does not offend the restriction of the ordinance, and that if any such assumption, any such factor, enters into the situation, then the Police Commissioner should say, 'We have very good grounds for believing that this is a dirty film, and show it to us?'

Do you think that then they are entitled to see it?

Mr. Mikva: That would be a different case, Your Honor. I do not know whether I would say he would be entitled to see it, but is not this case.

Justice Frankfurter: I would think the Court would say instead of indulging in presumptions one way or the other, 'Why don't you show it.'

Mr. Mikva: Let me get to the reasons why we won't show it, Your Honor, and that really is the other part of this defense that the court below has put up.

Justice Frankfurter: You say it would be a different case if the Police Commissioner said, 'The fact of the matter is I have had a private showing of this film and, on the basis of that, I think I want to see the film.' You think that would be a different case?

Mr. Mikva: I do not think that it would be this case. I know it would—I do not know if it would be decided the same as this case or not.

"Mr. Mikva: Your Honor, in *Kingsley Books*, which is the furthest this Court has gone, the Court relied on a specific finding, indeed, I think an admission of pornography to justify the ex-

traordinary interference with freedom of speech. We say there must be something comparable to that.

I would like to hope, Your Honor, that it would be at the very least that requirement. But we are saying that, at least, there must be something comparable to that requirement met in a case before the interference can be justified.

Just at what point the Court is going to draw that line is a hard question for me to answer, your Honor. As I say, I hope it would not go beyond the point that was drawn in *Kingsley Books*, but certainly even in that case, which drew the line further than it had ever been drawn before, there was a firm and positive finding by the Court that the matter was obscene."

We respectfully submit that the difference between the question presented and the question decided is more than trivial. In every case before and since *Near v. Minnesota*, 283 U.S. 697 (1931), this Court has discussed possible situations in which the claimed First Amendment privilege might have to give away to the necessities of the public welfare. In all of those distinctions, the limitation of free speech has been stated as being recognizable "only in *exceptional* cases."

Thus, in *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957), the Court upheld New York injunctive power against *obscene* books. There was a specific finding of obscenity by the lower court. Accordingly, it came within one of the "exceptions" to the First Amendment privilege against prior restraint.

Petitioner's entire argument is based on the simple premise that motion pictures as a whole are not one of the exceptions to free speech, and this Court has agreed in many previous decisions. If this is so, then the city or the state must come forward with *something* in addition to the fact that the communication is on celluloid before it can interfere with its expression. What that "something" should be was *not* the question presented by this case. Both sides conceded that the city came forward with *nothing* in this case other than that the communication was a motion picture. Petitioner is prohibited from showing the motion picture, not because it is obscene or falls within any other of the exceptional cases, but because it is an unsubmitted motion picture. This is the question presented by this case.

Indeed, as the colloquy between Justice Frankfurter and counsel for Petitioner, quoted above, indicates, even a "suspicion" on the part of the Police Superintendent presents a different question than the question presented by this case.

Accordingly, the majority decision, in light of the Record, and the question actually presented stands for the proposition that government may now impose a prior restraint on every kind of motion picture communication in order to insure a prohibition on the exceptional forms. Since the Court even in the instant case does not distinguish between motion pictures and other forms of communication in this important aspect, the consequences are indeed far reaching.



The Court further attributes to the Petitioner the position that the sole remedy available to the city or state is the "invocation of criminal processes under the Illinois pornography statute and then only after transgression." *This was not and is not Petitioner's position.* Indeed, the other cities in Illinois have undertaken different procedures which have been given judicial approval. Thus, in *Aurora v. Warner Brothers Pictures Distributing Corporation*, 16 Ill. App. 2d 273, 147 N.E. 2d 694 (1958), the Illinois courts granted an injunction to the City of Aurora to restrain the exhibition of an allegedly obscene film. The City of Aurora does not have a "prior submission" ordinance such as the one in question here. We do not know what other remedies in addition to the *Kingsley Book* procedure and the *Aurora* procedure could be developed by the city or state. It is clear, however, that the sustaining of our position does not leave the city open to violent attacks of pornography and the like. The 46 states and hundreds of cities that exist without a prior submission ordinance are proof of that fact.

In any event, Petitioner has never argued that all remedies other than the criminal statute would fail to meet the constitutional test. Our oral argument was on the question presented—that *this* ordinance cannot pass constitutional muster.

For the above reasons, Petitioner respectfully requests that the Petition for Rehearing be granted, that the case be restored to the docket, and that Petitioner be granted permission to file briefs and to reargue, so that the Court may consider the question as to whether the city may impose a ban on a motion

picture simply because it is a motion picture without any proof that the motion picture falls within one of the exceptional cases. The effects of this Court's decision are so far reaching that it ought to be made crystal clear that the decision rests on the question presented by this case and not a hypothetical substitute.

An extension of time was granted for the filing of this Petition by the Honorable Mr. Justice Clark up to and including the 27th day of February, 1961.

Dated, February 24, 1961.

Respectfully submitted,

FELIX J. BILGREY  
144 West 57th Street  
New York 19, New York

ABNER J. MIKVA  
231 South LaSalle Street  
Chicago 4, Illinois

*Counsel for Petitioner*

**Certificate of Counsel**

We, **FELIX J. BILGREY** and **ABNER J. MIKVA**, counsel for the above named petitioner, do hereby certify that the foregoing Petition for Rehearing of this cause is presented in good faith and not for delay.

Dated, February 24, 1961

**FELIX J. BILGREY**  
**ABNER J. MIKVA**

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FILED

JAMES E. BRENNAN, CLERK

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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1960

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No. 34  
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\_\_\_\_\_  
TIMES FILM CORPORATION, *Petitioner,*

v.

CITY OF CHICAGO, ET AL., *Respondent.*  
\_\_\_\_\_

MOTION FOR LEAVE TO FILE BRIEF ON BEHALF OF  
THE NATIONAL ASSOCIATION OF BROADCASTERS  
IN SUPPORT OF PETITION FOR REHEARING  
AND BRIEF

NATIONAL ASSOCIATION OF  
BROADCASTERS

1771 N Street, N. W.,  
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DOUGLAS A. ANELLO  
ROBERT V. CAHILL

*Counsel*

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1960

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No. 34

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**TIMES FILM CORPORATION, *Petitioner,***

**v.**

**CITY OF CHICAGO, ET AL., *Respondent.***

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**MOTION FOR LEAVE TO FILE BRIEF ON BEHALF OF  
THE NATIONAL ASSOCIATION OF BROADCASTERS  
IN SUPPORT OF PETITION FOR REHEARING  
AND BRIEF**

---

The National Association of Broadcasters respectfully moves for leave to file in support of the Petition for Rehearing of the decision of the Court entered in this case on January 23, 1961. Because of the time element, it was not possible to secure the consent of the Respondent to this Motion.

The National Association of Broadcasters, hereinafter called the Association, is a non-profit organization of radio and television broadcasters whose membership included as of February 15, 1961, 1720 AM

stations, 567 FM stations, 363 TV stations and all the radio and television nation-wide networks.

The interest of the Association in supporting the Petition for Rehearing in this case stems from one of the Association's basic objectives as set forth in its Bylaws, "To do all that is necessary and proper to encourage and promote customs and practices which will strengthen and maintain the broadcasting industry to the end that it may best serve the public".

We respectfully submit that the case at hand involves grave problems for all media. In our view, it would be extremely difficult to limit its influence to moving pictures, for what disrupts the basic freedoms guaranteed by the First Amendment with respect to one medium affects all others. To have real meaning, must not the constitutional guarantee of free speech and press be extended on an equal basis to all channels of communication? It would be anomalous indeed to suggest that these freedoms should not be applicable to any new media of communication which might be produced in the future. While freedom of the press is normally associated with, and had its historical genesis in, the publication of printed matter, it seems clear that its protection should not and cannot be limited to this medium. Any other conclusion would necessarily create a situation in which competing channels of communication would be placed at a relative disadvantage. If one were to be given a preference over another, inequitable influence would be given to the owners of the legally favored medium and there would result a serious impingement of the guarantee of equal protection of the laws.

This thought is sharpened by the fact that while the majority of the court in the instant case would limit

the effect of the decision to motion pictures, no justification is made for treating movies differently than other vehicles used for the dissemination of ideas and information. Are we to surmise that the court presumes that motion pictures are potentially lewd, and hence, it is permissible to authorize the prescreening of all in order to control some?

May not the use of this method of censorship to curb one medium be applied with equal logic to another? Admittedly, the rule against prior restraints upon a free press like all rules of freedom is not an absolute. Nevertheless, the occasions upon which such may be permitted are extremely limited. *Near v. Minnesota ex rel. Olson*, 283 U. S. 697 (1931); *Kovacs v. Cooper*, 336 U. S. 77 (1949); *Kingsley Books, Inc. v. Brown*, 354 U. S. 436 (1957).

In all of these cases it was indicated that under very exceptional circumstances a prior restraint might be justified. But no exceptional circumstance has been shown to exist in the case at bar, other than the fact that the medium concerned was a film rather than a book, a newspaper, or a radio script.

The sole question is not whether there exists an inherent right to show all motion pictures at least once no matter how obscene or inflammatory their content might be, but whether any city may require all motion picture exhibitors to submit all films for licensing and censorship prior to public exhibition. Indeed, we reiterate that unless a reasonable basis can be found for distinguishing movies from other media, equal protection of laws would seem to give validity to like censorship schemes for newspapers, books, magazines, radio and television. This appears to be especially true in view of the fact that neither the



standards of the ordinance itself nor the contents of the picture had any bearing upon the majority decision. The basic fundamental right of freedom of speech may not be so casually discarded to promote administrative convenience. If such a tenuous circumstance could be so established, could not the government require that all newspapers be submitted to a censor in order to assist it in preventing information from reaching print? Perhaps the court assumes that in the case of other media the people have adequate protection through ordinary judicial processes of criminal action and/or injunctive relief. We submit that this is not a sound assumption. But even if true, what is vital to freedom of expression and distinguishes a free society from a police state is that there be no prior censorship of any media . . . that no official may lawfully say in advance, this is approved and may be published, or this is not approved and, hence, may not be published. This is no more than a restatement of Madison's phrase:

"It is better to leave a few of the noxious branches to their luxurious growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits."

Finally, we would like to call attention to what might be considered to be something of a paradox. The instant case would permit the submission to an administrative body for approval of all motion pictures to be exhibited in theaters in Chicago; yet, those same films may be shown without prior submission or license over any television station in that very city. This issue was resolved in *Allen B. Dumont Laboratories v. Carroll*, 184 Fed. 2d 153 (CA 3 1950) cert. denied 340 U. S. 929, where the court denied the right

of a state to pass upon films to be shown over television. Yet, as this court understands, the televising of a film may reach many times the audience that the showing of that same film would if projected in a local theater.

Much of what is shown on television is either filmed or taped. Indeed, to adjust to the differences in time zones between various sections of the country, the recent Presidential Debates were taped for subsequent transmission. We would assume the court intends to draw no distinction between tape and film since both serve identical purposes. Would then a federal statute requiring the submission of all television films or tapes to a central body be considered valid on its face? We would trust not. Assuming clearance is necessary, the delay in broadcasting would prove destructive. Just as justice delayed is justice denied, so it is true that news delayed is news denied. The democratic process is dependent upon unhampered communications, and only the most serious and substantial evils should justify interference with this freedom.

These then are the matters we believe the court would wish to consider and which we would seek to pursue further as Amicus in the event the Petition for Rehearing is granted.

Respectfully submitted,

NATIONAL ASSOCIATION OF  
BROADCASTERS

1771 N Street, N. W.  
Washington 6, D. C.

DOUGLAS A. ANELLO  
ROBERT V. CAHILL

February 27, 1961

*Counsel*

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FEB - 7 - 1960

IN THE

**Supreme Court of the United States**

**OCTOBER TERM, 1960**

**No. 34**

**TIMES FILM CORPORATION,**

*Petitioner,*

*v.*

**CITY OF CHICAGO, RICHARD J. DALEY and  
TIMOTHY J. O'CONNOR,**

*Respondents.*

**MOTION FOR LEAVE TO FILE A BRIEF ON BE-  
HALF OF MOTION PICTURE ASSOCIATION OF  
AMERICA, INC., AS AMICUS CURIAE IN SUPPORT  
OF THE PETITION FOR REHEARING**

**SIDNEY A. SCHREIBER,**

*Attorney for Motion Picture Association  
of America, Inc., as Amicus Curiae.*

**BARBARA A. SCOTT,**

*of Counsel.*

IN THE  
**Supreme Court of the United States**

October Term, 1960

No. 34

---

TIMES FILM CORPORATION,

*Petitioner,*

vs.

CITY OF CHICAGO, RICHARD J. DALEY and  
TIMOTHY J. O'CONNOR,

*Respondents.*

---

**MOTION FOR LEAVE TO FILE A BRIEF ON BEHALF OF MOTION PICTURE ASSOCIATION OF AMERICA, INC., AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR REHEARING**

Motion Picture Association of America, Inc. hereby respectfully moves for leave to file as *amicus curiae* in this case a brief in support of the petition for rehearing. The consent of the attorney for the petitioner has been obtained. On February 3, 1961 movant sent a telegram to the attorney for the respondent. A copy of that telegram is appended hereto. No acknowledgment has been received.

Motion Picture Association of America is a corporation, organized in March, 1922 under the Membership Corporations Law of New York, for the objects, among others, of fostering the common interests of those engaged in the motion picture industry in the United States by establishing and maintaining the highest possible moral and artistic standards in motion picture production, by developing the educational as well as the entertainment value and general usefulness of the motion picture, and by diffusing accurate and reliable information with reference to the industry.

The President of the Association is Eric A. Johnston and its membership is composed of the largest and most important companies engaged in production and distribution of motion pictures. Its distributing company members are: Allied Artists Pictures Corporation, Buena Vista Film Distribution Company, Inc., Columbia Pictures Corporation, Metro-Goldwyn-Mayer Inc., Paramount Pictures Corporation, Twentieth Century-Fox Film Corp., United Artists Corporation, Universal Pictures Company, Inc., and Warner Bros. Pictures Distributing Corp. These companies distribute motion pictures made by them or by others for distribution by them at studios, mainly in Los Angeles, and sometimes abroad. They furnish, it is estimated, more than 90% of the motion pictures annually exhibited in motion picture theatres in cities, towns and villages throughout the United States, including the City of Chicago. The petitioner, Times Film Corporation, is not a member of the Association.

By order of this Court, 364 U. S. 805, the Motion Picture Association was granted leave to file a brief as *amicus curiae* in this cause.

It is believed that the brief of the Motion Picture Association in support of the petition for rehearing, which the Association requests permission to file as *amicus curiae*, will aid the Court in determining petitioner's request for a rehearing.

WHEREFORE, it is respectfully urged that Motion Picture Association be granted leave to file herewith its brief as *amicus curiae*.

Respectfully submitted,

SIDNEY A. SCHREIBER,

*Attorney for Motion Picture  
Association of America, Inc.*

28 West 44th Street,  
New York 36, New York.

BARBARA A. SCOTT,  
*of Counsel.*

New York, February 27, 1961.

**Appendix A**

WESTERN UNION

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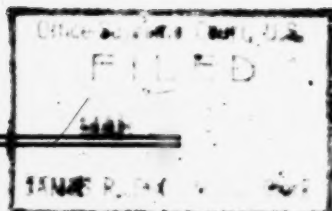
February 3, 1961

JOHN C. MELANIPHY, ESQ.  
511 CITY HALL  
CHICAGO, ILLINOIS

RE: TIMES FILM v. CHICAGO. KINDLY REQUEST  
CONSENT OF CITY OF CHICAGO TO MOTION PICTURE  
ASSOCIATION'S FILING BRIEF AMICUS CURIAE IN  
SUPPORT OF A PETITION FOR REHEARING IN ABOVE  
ACTION. PLEASE ADVISE.

SIDNEY SCHREIBER, GENERAL ATTORNEY  
MOTION PICTURE ASSOCIATION  
28 WEST 44 STREET, NEW YORK

LE COPY



IN THE

**Supreme Court of the United States**

**OCTOBER TERM, 1960**

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**TIMES FILM CORPORATION,**

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*v.*

**CITY OF CHICAGO, RICHARD J. DALEY and  
TIMOTHY J. O'CONNOR,**

*Respondents.*

**BRIEF ON BEHALF OF MOTION PICTURE  
ASSOCIATION OF AMERICA, INC. AS AMICUS  
CURIAE IN SUPPORT OF THE PETITION FOR  
REHEARING**

**SIDNEY A. SCHREIBER,**  
*Attorney for Motion Picture Association  
of America, Inc., as Amicus Curiae.*

**BARBARA A. SCOTT,**  
*of Counsel.*



# INDEX

	PAGE
Summary of Grounds for Rehearing .....	1
CONCLUSION .....	11

## Table of Cases Cited

Amer. Civil Liberties Union v. Chicago, 3 Ill. 2d 334, 121 N. E. 2d 585 .....	7
Associated Press v. U. S. 326 U. S. 1 .....	5
Chaplinsky v. New Hampshire, 315 U. S. 568 .....	2, 4, 5
City of Aurora v. Warner Bros. Pictures Dist. Corp., 16 Ill. App. 2d 273, 147 N. E. 2d 694 (1958) .....	1, 9, 10
Dennis v. United States, 341 U. S. 494 .....	8
Holmby v. Vaughan, 350 U. S. 870 .....	7
Joseph Burstyn, Inc. v. Wilson, 343 U. S. 495 .....	2, 5, 6, 7
Kingsley Books, Inc. v. Brown, 354 U. S. 436 .....	2, 5, 6, 10
Kingsley Pictures Corp. v. Regents, 360 U. S. 684 ..	6
Mutual Film Corp. v. Ohio, 236 U. S. 230 .....	4
Nat. Broadcasting Co. v. U. S., 319 U. S. 190 .....	5
Near v. Minnesota, 283 U. S. 697 .....	2, 3, 6, 8
Roth v. United States, 354 U. S. 476 .....	2, 5, 10
Shelton v. Tucker, 364 U. S. 479 .....	8, 9
Talley v. California, 362 U. S. 60 .....	8, 9
Thornhill v. Alabama, 310 U. S. 88 .....	5
Winters v. New York, 333 U. S. 507 .....	11

# Articles, Periodicals and Other Miscellaneous Material Cited

## PAGE

Chafee, Zachariah, <i>Freedom of Speech</i> (1920) .....	3, 4
Emerson, <i>The Doctrine of Prior Restraint</i> , 20 <i>Law and Contemporary Problems</i> 648, 661 .....	4
Fahy, Charles, <i>The Judicial Philosophy of Mr. Justice Murphy</i> , 60 <i>Yale Law J.</i> 812 .....	5
Hendel, Samuel, Charles Evans Hughes and the Supreme Court (1951) .....	6
Nimmer, <i>The Constitutionality of Official Censorship of Motion Pictures</i> , 25 <i>U. Chi. L. Rev.</i> 625, 634, 635	7

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1960

No. 34

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TIMES FILM CORPORATION,

*Pétitioner,*

*v.*

CITY OF CHICAGO, RICHARD J. DALEY and  
TIMOTHY J. O'CONNOR,

*Respondents.*

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**BRIEF ON BEHALF OF MOTION PICTURE  
ASSOCIATION OF AMERICA, INC. AS AMICUS  
CURIAE IN SUPPORT OF THE PETITION FOR  
REHEARING**

Motion Picture Association of America, which was granted leave to file briefs as *amicus curiae* (364 U. S. 805), submits this brief in support of the petition of Times Film Corporation for rehearing of the cause decided by the Court's opinion rendered January 23, 1961.

**Summary of Grounds for Rehearing**

The Court misconstrued the question presented and the contentions advanced. It therefore (1) premised its decision *en dicta* which did not intend the conclusion reached and (2) failed to consider, alternative to administrative censorship, the availability of more moderate regulation as illustrated by the decision of the Illinois Appellate Court in *City of Aurora v. Warner Bros. Distributing Corp.*, 16 Ill. App. 2d 273, 147 N. E. 2d 694 (1958).

Justice Clark, writing for the majority, posed the question for decision by the Court to be "whether the ambit of constitutional protection includes complete and absolute freedom to exhibit at least once any and every kind of motion picture." Disposition of that question was based on rejection of, as unsound, petitioner's supposed contentions that "the public exhibition of motion pictures must be allowed under any circumstances," and that "the state's sole remedy is the invocation of criminal process . . . and then only after a transgression."

This was neither the question presented nor the contention advanced by the petitioner or the *amicus curiae*. Both recognized throughout the right of a community to suppress certain classes of constitutionally unprotected speech (*Amicus Curiae* Brief, MPA, pp. 3, 26). The attack here was upon the unconstitutionality of the *method* employed by the City of Chicago—a method which excludes from public showing *all* films until after inspection by the licensor, not upon the right of the community to control objectionable matter.

# I

Having formulated the question broader than presented or necessarily present and having stated the contentions for the claimed liberty from censorship inspection broader than advanced, or needed to be advanced, the Court then proceeded to reason that dicta in its prior cases, to the effect that not all prior restraints of speech may be invalid, required the rejection of that claim. Although the dicta cited in *Near v. Minnesota*, 283 U. S. 697, 715-716; *Chaplin v. New Hampshire*, 315 U. S. 568, 571-572; *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495, 502; *Roth v. United States*, 354 U. S. 476, 483, and *Kingsley Books v. Brown*, 354 U. S. 436, 441, may indicate such a conclusion from the "perspective", the opinion selected, they are not authority against the proposition presented by petitioner,

namely, that the Constitution gives immunity from an administrative censorship which bars publication of a form of expression of speech prior to inspection and approval. As Chief Justice Warren states in his dissent to so interpret the dicta of those cases is "contrary to the intention at the time of their rendition".

In the landmark *Near* case, Chief Justice Hughes, upon analysis of its "operation and effect", considered a state statute which empowered injunctions against publications adjudged obscene or defamatory to be "but a step to a complete system of censorship". He ruled it unconstitutional for otherwise there would be "admission of the authority of the censor against which the constitutional barrier was erected" (283 U. S. 697, 721).

In his reference to the constitutional barrier erected against the "authority of the censor", Chief Justice Hughes mentioned no exceptions or limitations.

In his reference to the constitutional immunity from previous restraints generally, Chief Justice Hughes did mention limitations "of an exceptional nature" (*id.* pp. 715-716). Those he described as relating to war-time emergencies are not pertinent here. It is noteworthy that Chief Justice Hughes' description of them was based on and followed that of Professor Zachariah Chafee's book on Freedom of Speech (1920 Edition, p. 10), to which he referred in a footnote in the opinion.

Then Chief Justice Hughes added the sentence with which we are most concerned here: "On similar grounds the primary requirements of decency may be enforced against obscene publications" (*id.*, p. 716). For this statement no authority was cited, but when one looks at the full text of what Chafee had said and to which Chief Justice Hughes had referred, it is apparent that the Chief Justice was again paraphrasing and following Chafee. Reproduced below is the full paragraph from Chafee to which the Supreme Court refers:

" \* \* \* In some respects this [Blackstone's] theory goes altogether too far in restricting state action. The prohibition of previous restraint would not allow the government to prevent a newspaper from publishing the sailing dates of transports or the number of troops in a sector. It would render illegal removal of an indecent poster from a billboard or the censorship of moving pictures which has been held valid under a free speech clause. \* \* \* " [Citing *Mutual Film Corp. v. Industrial Commission of Ohio*, 236 U. S. 230.] (Chafee, *Freedom of Speech*, pp. 9-10 (1920).)

From this history and textual analysis, it would appear that Chief Justice Hughes in this sentence was referring to the removal of an offensive poster and possibly the censorship of motion pictures, when motion pictures were not accorded First Amendment protection.<sup>1</sup>

In *Mutual Film Corp. v. Ohio Indus'l Comm.*, 236 U. S. 230, which denied motion pictures that protection, it was said: " \* \* \* [F]reedom of opinion and its expression \* \* \* are too certain to need discussion " (236 U. S. 230, 243). The implication was that, as a member of the press, motion pictures would have been entitled to freedom from censorship.

It is demonstrable that Mr. Justice Murphy in speaking in *Chaplinsky* of "prevention" of certain well-defined and narrowly limited classes of speech which included the obscene, was in no way envisaging the constitutional validity of a system of licensing the dissemination of ideas in order to prevent obscenity. This should be clear from what is known of Mr. Justice Murphy's views that because of their vast potentialities in communication, discussion

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<sup>1</sup> Cf. the analysis of the passage under consideration by Professor Emerson, *The Doctrine of Prior Restraint*, 20 Law and Contemporary Problems, 648, 661: "The entire passage remains obscure. It may be that the Chief Justice merely intended to make the traditional point that seditious and obscene publications were subject to subsequent punishment as exceptions to the First Amendment."

and propaganda, the character and extent of governmental control of the mass media was a matter of grave and serious concern.<sup>2</sup>

By his use of the word "prevention" Mr. Justice Murphy apparently meant no more than did Mr. Justice Holmes in his use of the term in consideration of a statute which made it a crime to circulate certain written matter. Mr. Justice Holmes wrote:

"It does not appear and is not likely that the statute will be construed to *prevent* publications merely because they tend to produce unfavorable opinions of a particular statute or of law in general." *Fox v. Washington*, 236 U. S. 273, 277. (Emphasis added.)

In *Burstyn*, which did much toward freeing motion pictures from obvious excesses of the censor, the dicta from *Near* and *Chaplinsky* are repeated, yet at the same time it was significantly observed that when limitation of speech by prior restraint is challenged, the State has a heavy burden to demonstrate that an exceptional case is presented (343 U. S. at 504).

*Roth*, which dealt with a prosecution under a criminal statute for obscenity, made no mention of the problem of the constitutional validity of a prior restraint of all publications in order to reach an obscene one. *Kingsley v. Brown* applied to a New York statute empowering an injunction against further distribution of a publication

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<sup>2</sup> See his opinions (dissenting) in *Nat. Broadcasting Co. v. U. S.* 238, 319 U. S. 190, 227-238 (regulation of radio by F. C. C.); *Associated Press v. U. S.*, 326 U. S. 1, 49, antitrust action by the Attorney General against newspaper publishers. See also his opinion in *Thornhill v. Alabama*, 310 U. S. 88, 96-98, and Charles Fahy, *The Judicial Philosophy of Mr. Justice Murphy*, 60 Yale Law J. 812 (1951).



adjudged "obscene" the same analysis as did *Near*, namely, operation and effect in substance, to see whether the result was or was not "censorship", and found the statutory scheme to "preclude what may fairly be deemed licensing or censorship", observing that the statute "studiously withholds restraint upon matters not already published and not yet found to be offensive" (354 U. S. at pp. 441, 445).

The dicta of *Near*, *Burstyn* and *Kingsley*, far from indicating an adverse decision on the question expressly saved in *Kingsley Pictures Corp. v. Regents*, 360 U. S. 684, and presented by the instant action, pointed to the Court's striking down the Chicago ordinance, buttressed as they were by a multitude of "free speech" cases based upon and following *Near*,<sup>3</sup> many of which are cited in Chief Justice Warren's dissent.

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<sup>3</sup> See Hendel, Samuel, Charles Evans Hughes and the Supreme Court, 1951; where the author, in commenting on the importance of the *Near* decision by Chief Justice Hughes, quotes this comment on *Near*, Professor Chafee made in his later book, *Free Speech in the United States*, 1941, p. 381:

"Its strong hostility to previous restraints against the expression of ideas may conceivably be applied to quite different forms of censorship, affecting other media of communication beside the press," and goes on to say—

• "While Professor Chafee's anticipations have not yet been substantially realized, it is true that the *Near* case has served as a landmark in attempts to batter down the restrictions of previous restraint and may yet play a part in curbing censorship in related fields." (pp. 149-150)

## II

The Court refused to invalidate Chicago's complete censorship system, because it would not limit the city's choice of administrative censorship as a remedy to cope with the "dangers of obscenity".<sup>4</sup>

The possibility is extremely remote that motion picture theatres in Chicago, to any extent beyond the extremely rare occurrence of deliberate law breaking, would exhibit to the public motion pictures which were obscene in violation of Illinois' penal law against obscenity, to which, as the Illinois Court said, must be assimilated the definition of the word in the censorship ordinance. (*Amer. Civil Liberties Union v. Chicago*, 3 Ill. 2d 334, 121 N. E. 2d 585.) The number of motion pictures distributed to theatres in the United States for exhibition to the theatregoing public which even the most narrow minded would claim to be legally "obscene" is a negligible percentage.

True it is that some exhibitors in Chicago might exhibit a motion picture which the censors for reasons might seek to hold obscene. The censors did so with the motion picture *THE MIRACLE*, despite the fact that the members of this Court had viewed the picture, described it in its opinion in the *Burstyn* case, and found that it could not by governmental authority be barred from view. The Court was apprised how arbitrarily, in practice, Chicago applied its ordinance in its purported effort to deal with obscenity

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<sup>4</sup>As to obscenity the Court pointed out that petitioner did not attack any specific standard in the ordinance, which among other standards imposes the standard of obscenity. But as to obscenity see *Holmby v. Vaughan*, 350 U. S. 870, analyzed and commented upon in *Nimmer, The Constitutionality of Official Censorship of Motion Pictures*, 25 U. Chi. L. Rev., 625, 634-635. The *Holmby* case is omitted from the list of prior motion picture cases decided by the Court which involved questions of standards, cited and summarized in footnote No. 3 of the opinion of the Court.

and how the Courts in review had repeatedly had to curb the censor.

The Court should reconsider whether the city's interest in protecting against obscenity required its ordinance to be upheld in a decision which may engender the proliferation of similar ordinances in the hundreds of cities and towns in the United States. No medium could flourish in the overall interests of the public or perhaps even survive at all if that should take place. The judgment weighing interests made in *Near* would seem peculiarly applicable here. There, Chief Justice Hughes pointed out that "the fact that the liberty of the press may be abused by a miscreant does not make any less necessary the immunity of the press from prior restraint", and, in rejection of the State's asserted interest in suppressing the evil of notorious publications of scandals and scurrilous matter, pointed out that in the theory of the constitutional guaranty "even a more serious public evil would be caused by authority to prevent publications" (283 U. S. 697, 720, 722).

Moreover the Court by premising its decision on the broader question and supposed contentions precluded consideration of the existence or availability of less restrictive means of achieving the same objective. This was completely contrary to the principle previously established by this Court in a long line of decisions which examined the constitutionality of statutory schemes which attempted to control thought or expression. *Shelton v. Tucker*, 364 U. S. 479, 488, 493 and cases cited therein; *Talley v. California*, 362 U. S. 60; *Dennis v. United States*, 341 U. S. 494, 542.

Justice Harlan, concurring in the *Talley* case, *supra*, delineated the Court's approach to the examination of statutory action impinging on speech thus:

"In judging the validity of municipal action affecting rights of speech or association protected against invasion by the Fourteenth Amendment, I do not believe that we can escape, as Mr. Justice Roberts

said in *Schneider v. State*, 308 U. S. 147, 161, 'the delicate and difficult task' of weighing 'the circumstances' and appraising 'the substantiality of the reasons advanced in support of the regulation of the free enjoyment of' speech. More recently we have said that state action impinging on free speech and association will not be sustained unless the governmental interest asserted to support such impingement is compelling. See *N. A. A. C. P. v. Alabama*, 357 U. S. 449, 463, 464; *Sweezy v. New Hampshire*, 354 U. S. 234, 265 (concurring opinion); see also *Bates v. Little Rock*, 361 U. S. 516." (at p. 66).

And as recently as this Term, Justice Stewart, speaking for the majority in the *Shelton* case, reaffirmed the principle:

"In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." (at p. 488) (Emphasis added)

Of course it must be assumed that the majority of the Court in reaching its conclusion in the *Times Film* case was well aware of its recent holding in the *Shelton* case, cited in Justice Warren's dissenting opinion, but it is not apparent that the Court was fully cognizant of all of the alternatives open to Chicago and other municipalities in the prevention of the showing of motion pictures which offend because they may be obscene.

In *City of Aurora v. Warner Bros. Distributing Corp.*, *supra* (cited at p. 3, *amicus curiae* brief MPA) the Illinois Court of Appeals upheld the use of a preliminary injunction to restrain the exhibition of the motion picture *BABY DOLL*. *BABY DOLL* had been booked for exhibition on January 29, 1957 in the Paramount theatre in Aurora, Illinois. Aurora had no ordinance requiring the submission of all films for licensing prior to exhibition. But *BABY DOLL*, based on a

play of Tennessee Williams and directed by Elia Kazan, like all motion pictures exhibited nationally was known by "reputation." On the day the picture was scheduled to open, the local authorities applied for a preliminary injunction forbidding its exhibition. Affidavits in support of and in opposition to the injunction were proffered and after argument the Court entered a preliminary injunction enjoining the exhibition until further order. The Appellate Court of Illinois upheld the injunction, concluding that the City had made a *prima facie* showing that the picture was obscene under the test established by this Court in *Roth v. United States*, 354 U. S. 476.

There was never any public exhibition of this motion picture in the City of Aurora.

Control of the exhibition of obscene motion pictures by injunction (not unlike the procedure sanctioned by this Court in *Kingsley v. Brown, supra*) has been sanctioned by the Illinois Courts. Experience has shown that the avowed governmental purpose can be achieved without "broadly stifling fundamental \* \* \* liberties" by subjecting *all* speech, protected or unprotected, to administrative examination and licensing.

The Court's posing of the question and its subsequent failure to consider the procedure adopted in the *Aurora* case erroneously led it to premise its decision on a choice between no control by the state, that is "complete and absolute freedom" to exhibit, on the one hand, and the imposition of administrative censorship on the other. It can only be concluded that the Court believed that given this choice it was necessary to uphold, with respect to motion pictures, unlike any other media, administrative censorship. It is respectfully submitted that the Court was presented with a broader choice which it failed to consider. Consideration of the application of this equally effective but less embracing method of control of speech should lead to the conclusion that an ordinance requiring

submission of *all* motion pictures for licensing goes far beyond what is necessary to achieve "a legitimate governmental purpose".

Few decisions of the Court in recent years have given rise to such widespread public interest evidenced by editorial comment in the press all over the country. Although the opinion of the majority insists that the Court's present sanction of administrative censorship of a medium of expression entitled to constitutional guarantees is presently confined only to motion pictures, the public apparently cannot appreciate the distinction made by the Court and is apprehensive of the effect of the decision rendered by so closely divided a Court.<sup>5</sup>

## CONCLUSION

For the reasons advanced, we respectfully submit that this Court grant a rehearing of this cause, restore this case to the docket and allow the filing of additional briefs and oral argument.

Respectfully submitted,

SIDNEY A. SCHREIBER,  
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of America, Inc., as Amicus Curiae.*

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<sup>5</sup>The complexity and importance before a divided court of somewhat related issues in a free speech case, *Winters v. New York*, 333 U. S. 507, 518, resulted in three arguments.



**Certificate of Counsel**

I hereby certify that I am counsel for the *amicus curiae* Motion Picture Association of America and that the foregoing brief in support of the petition for rehearing is in my opinion well founded in law and fact and is proper to be filed herein and is presented in good faith and not for delay.

Respectfully submitted,

SIDNEY A. SCHREIBER.



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TIMOTHY J. O'CONNOR,**

*Respondents.*

**On Petition for Rehearing**

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**MOTION FOR LEAVE TO FILE A BRIEF WITH BRIEF  
ANNEXED AS *AMICI CURIAE* FOR THE AMERICAN  
SOCIETY OF MAGAZINE PHOTOGRAPHERS AND  
THE SOCIETY OF MAGAZINE WRITERS**

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*Respondents.*

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**MOTION FOR LEAVE TO FILE A BRIEF AS  
*Amici Curiae***

American Society of Magazine Photographers (hereinafter referred to as "A.S.M.P.") and the Society of Magazine Writers hereby respectfully move for leave to file a brief annexed hereto as *amici curiae* in this case.

Petitioner has consented in writing to the filing of this *amicus* brief. Respondents have refused to consent thereto.

A.S.M.P., *amicus curiae* herein, is a membership corporation organized under the laws of the State of New

York in 1945. It consists of approximately 575 members from all over the United States and its membership includes most of America's foremost photographers. It is dedicated to the representation of its members in the field of magazine photography. The work of the member photographers, however, is not limited to magazine photography but includes photography for newspapers, books, commercial purposes, and exhibition purposes. Many of the member photographers also work in the medium of documentary motion pictures and other forms of cinematic expression.

Because of its concern with photography in general, A.S.M.P. has a vital interest in the determination of the case under consideration. The close connection between motion picture photography and still photography is apparent. Both are versions of the same general media and, in their technical aspect, involve similar artistic concerns. Motion pictures are, of course, a form of still photography in that any motion picture consists of a series of still pictures, known as "frames" which are, individually, no different from any other negative of a still picture. The close similarity of these two forms of photography is made apparent when one considers that the still photographs generally used to advertise a motion picture are photographs made from frames of the motion picture itself.

The Society of Magazine Writers, also *amicus curiae* herein, is an unincorporated association formed in the State of New York in 1948. It consists of approximately 190 members, many of whom are considered to be among the first rank of writers in this country. In addition to contributing written material to magazines of all kinds throughout the United States, member writers have also

written many books, a number of which have been made into motion pictures and shown in theaters throughout the country. Member writers also work in the fields of radio and television.

Since, as is common knowledge, much of the material which first appears in books and magazines today is purchased by motion picture companies and is used as the basic scenario for motion pictures, the Society of Magazine Writers is directly concerned with the decision of this Court in the instant case. It is obvious that any prior licensing restraint upon motion pictures will, in the nature of things, inevitably act as a prior restraint upon the work product of the members of the Society of Magazine Writers.

In view of the similarities mentioned and in view of the language used by the opinion of this Court in the instant case, both *amici* herein feel that it will be difficult, if not impossible, to insulate the creative work-product of their members from the effect of the Court's decision regarding motion pictures. In consequence they submit that they have a right to be heard in support of the petition of the Times Film Corporation for a rehearing in this case.

Dated: February 27, 1961

Respectfully submitted,

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**On Petition for Rehearing**

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**BRIEF AS AMICI CURIAE FOR THE AMERICAN  
SOCIETY OF MAGAZINE PHOTOGRAPHERS  
AND THE SOCIETY OF MAGAZINE WRITERS**

---

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# INDEX

	PAGE
PRIOR PROCEEDINGS	1
INTEREST OF THE <i>Amici Curiae</i>	2
SUMMARY OF ARGUMENT	2
ARGUMENT:	
The court's decision is not dispositive of the Equal Protection question which appears on the face of the Chicago ordinance	3
CONCLUSION	13

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Allen B. Dumont Laboratories, Inc. v. Carroll, 184 F. 2d 153 (3d Cir. 1950), <i>cert. denied</i> , 340 U. S. 929 (1951)	4, 5, 8
Borden's Farm Products Co. v. Baldwin, 293 U. S. 194 (1934)	12
Farmers Union v. WDAY, Inc., 360 U. S. 525 (1959)	8
Gitlow v. New York, 268 U. S. 652 (1925)	8, 9
Joseph Burstyn, Inc. v. Wilson, 343 U. S. 495 (1952)	6, 8, 9

Mutual Film Corp. v. Ohio, 236 U. S. 230 (1915) 7

Times Film Corp. v. City of Chicago, et al., 29 U. S. L.  
Week 4120 (U. S. Jan. 24, 1961) 4, 8

United States v. Carolene Products Co., 304 U. S. 144  
(1938) 12

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131 (1948) 8

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(1954) 11

Ernst and Lorentz, Censored—The Private Life of  
the Movie (1930) 5

Jahoda, The Impact of Literature: A Psychological  
Discussion on Some of the Assumptions in the  
Censorship Debate (1954) 11



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## **Prior Proceedings**

The opinion of the Supreme Court of the United States was rendered on January 23, 1961 and is reported in 29 U. S. L. Week 4120 (Jan. 24, 1961).

### **Interest of the *Amici Curiae*.**

We have in the accompanying notice of motion set forth the pertinent facts concerning the American Society of Magazine Photographers and the Society of Magazine Writers and the reasons why we believe acceptance by this Court of this brief submitted on behalf of these organizations as *amici curiae* is appropriate to the consideration of the petition for reargument. We believe that none of the litigants here will cover the question discussed herein.

### **Summary of Argument**

The opinions of this Court do not cover the question which *amici* believe to be at the core of this case, namely, whether the ordinance in question represents an unreasonable classification of motion pictures and thus denies petitioner the equal protection of the laws guaranteed by the Fourteenth Amendment. *Amici* suggest that although adequately preserved for jurisdictional purposes the equal protection point was not decided by this Court because the peculiar procedural posture of the case, in which neither of the courts below reached the merits and no evidence was taken, precluded a development of the facts.

The single argument made in this brief is that the failure of the litigants to deal adequately with the crucial problem of equal protection stems not from any obvious distinctions between moving pictures and other communications media but from the curious constitutional legal history of motion pictures and its late arrival as a means for the dissemination of ideas.

Whether or not the ordinance in question is a denial of equal protection rests on facts which can be best adduced in the District Court.

## ARGUMENT

**The Court's decision is not dispositive of the equal protection question which appears on the face of the Chicago ordinance.**

We address the Court on a single constitutional issue adequately protected for jurisdictional purposes but, as we read the proceedings, only tangentially touched upon in the pleadings, briefs or in the opinions of the Court. We refer to the isolated constitutional problem that goes to the equal protection provision of the Fourteenth Amendment.

For the purposes of our plea we need not burden the Court with a single extra word dealing with the concepts of censorship pre or post, nor does the question we raise deal with any appraisal of the nature or quality of the material that goes to the mind of man. We are concerned with the discrimination levelled against a single avenue of approach to the market place of thought—motion pictures into theaters. Even the phrase "movie censorship" begs the question.

Ideas are placed on film by separate pictures or "frames" and shown at such a speed as to be received by man as if the speech or behavior had continuity. This access to the market place of thought is recent in terms of the existence of our Constitution and is in competition with many other media in the effort to influence the mind or glands of man. We have no concern at this moment with placing any value judgment as to the type of persuasion, whether good or bad or whether fitting for saints or sinners.

In brief, we view this precious market place in its isolated constitutionally-protected ambit. By the conclusions reached in the *Times Film Corporation* case, ideas on celluloid to be presented in theaters by separate operators in each theater are subject to burdens of pre-treatment and pre-controls by the sovereign—in this case a city. But the identical ideas on identical types of film or equivalent tape may now in fact flow free of any pre-control or restraint if transmitted into a saloon, a home or a church. In fact, the present state of the law declares for unequal treatment between: (a) pre-censorship in Chicago of a piece of film shown to the public from a single machine run in a theater by an operator and (b) the identical piece of film shown in the same theater to the same audience free of pre-control, if and only if the mechanical process of diffusion is over the ether (*Dumont Laboratories v. Carroll*, 184 F. 2d 153 (3d Cir. 1950), *cert. denied*, 340 U. S. 929 (1951)). Surely this obvious discrimination casts grave doubt upon the constitutionality of the Chicago ordinance.

In addition, under the present system of the transmission by television of motion pictures previously exhibited in theaters, a motion picture which may be denied clearance by the Chicago licensing law may nevertheless be shown to people of all ages in all homes throughout the Chicago area by means of television. Moreover, with regard to certain special films, there exists the practice of exhibiting these films on television prior to exhibition in motion picture theaters. This was the case, for example, with the film "Richard III" produced and directed by Sir Laurence Olivier. It is submitted that deep thought by even the most imaginative among us would fail to disclose what possible beneficial effect the application of the

Chicago licensing law would have had upon the citizens of the City of Chicago in relation to the exhibition of "Richard III" in theaters since it had already been shown to millions in Chicago and elsewhere on non-precensored television. Nor need one be a prophet to state with some assurance that the growing use of so-called subscription or pay television will increase drastically the number of films which are shown on television prior to exhibition in motion picture theaters.

*Amici* are aware that *Dumont Laboratories v. Carroll*, *supra*, held that television, being subject to regulation only by the federal government, cannot constitutionally be subjected to state or municipal regulation, licensing or restraint. However, the obviously inseparable substantive characteristics of exhibiting motion pictures on television on the one hand and in theaters on the other, in the same locale, must cast some doubt against a prior restraint on the latter for stated purposes which often are made meaningless by the all-pervading influence of the former.

Furthermore, "frames" which were an integral part of a movie until censored are permitted free entrance into the market and hence into the minds of our people provided only that they are printed into newspapers or even in collections in book form. Without prior restraint books have been printed containing the precise picture "frames" deleted by city or state censors from motion pictures. (See Ernst and Lorentz, *CENSORED—THE PRIVATE LIFE OF THE MOVIE* (1930).)

There is no need here for any detailed survey of the process by which the First Amendment was assimilated into the Fourteenth and then how motion pictures were brought within the Fourteenth. This Court has had occa-

sion to cover this ground. *Joseph Burstyn Inc. v. Wilson*, 345 U. S. 495 (1952).

However, some historical perspective on the development of idea-disseminating media and their claim of constitutional protection may be helpful.

In 1787, at the time of the constitutional convention, there were 100 weekly gazettes with 1,000 average circulation, the largest library was 4,000 volumes, books were mainly imported from England, paintings were produced without any process of duplication and word of mouth diffusion of knowledge was carried on by travelers, soap box orators, preachers and town criers. Looking at this relative paucity of media for the dissemination of ideas it is no wonder that the debates at the constitutional convention made no reference to the market place of thought, the theory being that the States would exercise their own separate blue pencils under the concept of Federalism and that local means, where necessary, would be sufficient to cope with the limited methods of dissemination which then existed. The First Amendment was adopted not so much to cope with a major problem which then existed but rather to allay fears against action by a national government, new and untried. Since these early years, however, communications media have proliferated far beyond the imagination of the eighteenth century:

1830—The first penny daily newspaper "The Cent" was published in Philadelphia.

1844—Matthew Brady opened "Brady's Daguerrian Miniature Gallery" in New York City.

1895—The first American public exhibition of "moving pictures"—an amalgam of stills.

1905—Newsreels entered the market place in the form of a prize-fight between "Young Griffio" and "Battling Barnett."

1920—First U. S. commercial daily radio station—WWJ in Detroit.

1926—A facsimile picture (a drawing by Augustus John) first transmitted across the Atlantic.

1938—The first television theatre opened in Boston—admission fee 25¢.

1938—The first radio facsimile newspaper was issued at St. Paul, Minnesota.

1961—Subscription or "pay" television is being readied for general use.

Against these expanding and varied means of getting to the market place motion pictures have, it seems, been the unfortunate but by no means justified victims of a chronological quirk in the development of constitutionally protected areas of free speech and press.

In *Mutual Film Corp. v. Ohio*, 236 U. S. 230 (1915), movies shown in theaters were analogized, in effect, to the entertainment of the theater—the British Master of the Revels, the traveling vagabonds, and to forces which in England and to a lesser extent in our culture had historically seemed to warrant control by the sovereign. As a result of this analogy motion pictures were denied the protection of free speech and press granted to other forms of communication. Because of this denial, movies were prevented from enjoying the additional protection granted



by this Court to other communications media in 1925 in *Gitlow v. New York*, 268 U. S. 652, which held that the First Amendment guarantees of free speech and press were applicable to the States via the Fourteenth Amendment. Thus, even at this early stage movies were suffering from unequal treatment in the development of our constitutional law and were put at a disadvantage as compared with other forms of communication without factual justification.

It is well to note that the Chicago ordinance challenged in the *Times Film Corporation* case was passed in 1907 at a time when motion pictures were considered beneath the dignity of constitutional protection of any kind, whether federal or state. It was not until 1948 that movies began to be considered as a part of the free speech and press protected by the Constitution. This view, first expressed in *U. S. v. Paramount Pictures, Inc.*, 334 U. S. 131 (1938), was reinforced in 1952 in the *Burstyn* case, *supra*. However, neither of these decisions went far enough to overcome the constitutional disability to which motion pictures had been subjected. Man has a clear proclivity to fear the novel, and possibly movies-into-theaters were singled out for the unequal treatment of pre-control because they did not carry either the sacred liberty of the age-long struggle of freedom of ideas in print or the structural benefit of the immunity from control by other than federal power, as in the case of more recently developed radio and television. See *Dumont Laboratories v. Carroll*, *supra*; cf. *Farmers Union v. WDAY*, 360 U. S. 525 (1959). Perhaps motion pictures were born at the wrong moment in history. At any rate it is clear that they suffered unequal treatment because of the historical accident of having achieved consti-

tutional recognition only after the *Gitlow* doctrine spread the benevolence of the First Amendment into the crannies of every state and city. It is this inequality of treatment, never really overcome, which has forced motion pictures continually to fight an uphill battle in order to assume their undoubtedly proper place as an equal among communications media, burdened with equal responsibilities and enjoying equal protection with the other members of this field.

In historical perspective the Chicago ordinance, passed in 1907, looms as a Victorian anachronism which has survived through historical accident. We submit that this Court should reconsider this case and release motion pictures from this grip of the past.

We do not claim that this market place as distinguished from that of ships, kings or sealing wax is always constitutionally free from valid controls for later restraint. Wisdom must always be able to readjust possible discriminations and unequal treatment. Man often draws a line, as does constitutional law, a little to the right or a little to the left. However, inequalities to be constitutional must be based on reasonable and rational evidence, especially when, as here, they deal with speech protected by the First Amendment. As was said by Mr. Justice Clark writing for the majority of this Court in *Joseph Burstyn Inc. v. Wilson*, *supra*, 502, 503:

"It is further urged that motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression. Even if one were to accept this hypothesis, it does not follow that motion pictures should be disqualified from First Amendment protection \* \* \*. Nor does it follow that motion pictures are necessarily subject to the precise

rules governing any other particular method of expression. Each method tends to present its own peculiar problems. But the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule \* \* \*."

As the words of Mr. Justice Clark indicate, nothing is more cruel than unjustified egalitarianism. Nothing is more insulting to the Fourteenth Amendment than inequality of treatment unjustified by reason.

As far as we can find there is no evidence whatsoever in this record to justify unequal treatment for movies in theaters compared to movies over television into homes, movies by television in hotel dining rooms, picture books of censored movie scenes, pictures in tabloid newspapers or magazines, etc. Further, the inequalities created by the ordinance in question are even more difficult to justify since on its face the ordinance applies to newsreels and documentary films as well as fiction. We suggest that there is a constitutional point as yet not adequately presented to the minds of the judges of this Court, to wit: the inequality of treatment of this one pipeline to the mind of man and the rationale, if any, for the burden it creates. Nothing in the record, briefs or opinions suggests that this Court has taken judicial notice of any facts validating the separate and unequal treatment accorded to movies in theaters by the Chicago ordinance. We suggest that it might be of some advantage to the Court if this case were remanded, for evidence as to the reasonableness of the burdens placed on this, and only this, method of access to the market place of ideas.

Until a full disclosure of the factual basis behind the discrimination in this case has been presented it is impossible for those working in communications media similar to motion pictures, such as the members represented by *amici* herein, to determine accurately whether or not their creative work-product falls within a permissible area of discriminatory legislation. As must be clear to this Court, the failure factually to distinguish motion pictures from other media has already caused great uncertainty as to the scope of the decision of this Court in the instant case.

We need not burden this document to prove that education can be entertainment and entertainment can be educational and that each and every media in competition in this market place is capable of both. We suggest that where the market place of thought is concerned, there should be some attempt to produce rational and reasonable evidence relative to the peculiar danger which would warrant the City of Chicago under our Constitution to place special prior restraints upon motion pictures as compared, for example, to the 5 cent tabloid, with all its pictures of sex and crime, but brought into the home to be viewed as reality and not in terms of escapist material. By all recent studies, such "reality" has a more acute impact on the minds of adults and youths than do fictional movies. (See, for example, Bender, *A DYNAMIC PSYCHOPATHOLOGY OF CHILDHOOD* (1954) and Jahoda, *THE IMPACT OF LITERATURE* (1954).)

We suggest on the basis of the state of the record herein that the proper disposition of this case is to remand it to the District Court for a trial on the merits with respect to the question of unequal treatment. The peculiar pos-

ture of this case, in which a possible factual basis for the discrimination of the Chicago ordinance against motion pictures was not considered by the courts below because they found no justiciable issue, has served to obscure and confuse the equal protection point. Consequently the record indicates only a most casual treatment of this single most important aspect of the case and discloses no evidence upon which a reasoned decision can be based.

Because of the close similarities between motion pictures and other forms of communications and the confusion caused by this decision regarding its application to communications media similar to but not identical with motion pictures, *amici* strongly urge this Court to grant the petition for rehearing and remand this case to the District Court for a full canvass of the factual basis for the classification made by the Chicago ordinance. (See *Borden's Farm Products Co. v. Baldwin*, 293 U. S. 194, 209-11 (1934) and *United States v. Carolene Products Co.*, 304 U. S. 144, 153, 154 (1938).) Only then will this Court have before it sufficient facts upon which to decide whether the Chicago ordinance is a denial of equal protection and to clarify the scope of its decision with regard to other communications media. We submit that since this Court has now determined that a justiciable issue does exist a remand to the District Court would be both proper and desirable.

**Conclusion**

The petition for rehearing should be granted and the case remanded to the District Court for the sole purpose above indicated.

Respectfully submitted,

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IN THE

**Supreme Court of the United States**

October Term, 1960

**No. 34**

**TIMES FILM CORPORATION,**

*Petitioner,*

*against*

**CITY OF CHICAGO, RICHARD J. DALEY and  
TIMOTHY J. O'CONNOR,**

*Respondents.*

---

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**MOTION FOR LEAVE TO FILE BRIEF ON BEHALF OF  
AMERICAN BOOK PUBLISHERS COUNCIL, INC. AS  
AMICUS CURIAE IN SUPPORT OF MOTION FOR  
REHEARING (OF DECISION OF THIS COURT SUSTAIN-  
ING CONSTITUTIONALITY OF SEC. 155-4 OF THE  
MUNICIPAL CODE OF THE CITY OF CHICAGO) AND  
REVERSAL AND BRIEF AS AMICUS CURIAE**

---

---

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# INDEX

	PAGE
Motion for Leave to File Brief on Behalf of American Book Publishers Council, Inc. as <i>Amicus Curiae</i> ..	1
Appendix A .....	3
Brief of American Book Publishers Council, Inc. as <i>Amicus Curiae</i> .....	5
Interest of American Book Publishers Council, Inc. ....	5
Argument .....	6
Conclusion .....	11

## Table of Cases Cited

Joseph Burstyn, Inc. v. Wilson, 343 U. S. 495 .....	9
Kingsley Books, Inc. v. Brown, 354 U. S. 436 .....	8
Near v. Minnesota, 283 U. S. 697 .....	7
Roth v. United States, 354 U. S. 476 .....	8
Shelton v. Tucker, — U. S. —, .....	6
Smith v. California, 361 U. S. 147 .....	10

IN THE  
**Supreme Court of the United States**

October Term, 1960

No. 34

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TIMES FILM CORPORATION,

Petitioner.

*against*

CITY OF CHICAGO, RICHARD J. DALEY and  
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**MOTION FOR LEAVE TO FILE BRIEF ON BEHALF OF  
AMERICAN BOOK PUBLISHERS COUNCIL, INC. AS  
AMICUS CURIAE IN SUPPORT OF MOTION FOR  
REHEARING (OF DECISION OF THIS COURT SUSTAIN-  
ING CONSTITUTIONALITY OF SEC. 155-4 OF THE  
MUNICIPAL CODE OF THE CITY OF CHICAGO) AND  
REVERSAL AND BRIEF AS AMICUS CURIAE**

American Book Publishers Council, Inc. hereby respectfully moves for leave to file the brief appended hereto as *amicus curiae* in support of the motion for rehearing by this Court of its decision sustaining the constitutionality of Sec. 155-4 of the Municipal Code of the City of Chicago. The consent of the attorney for the petitioner has been obtained. On February 3, 1961, movant sent a telegram to the attorney for respondent, a copy of which is appended below. No response to that telegram has been received.

American Book Publishers Council, Inc. is a membership corporation of which the leading publishers of books in general circulation and the leading university presses are members. It is estimated that the 162 members of the Council publish and distribute over 90% of all general books. Among these publishers are Doubleday & Company,

The Macmillan Company, McGraw-Hill Book Company, Charles Scribner's Sons, Harper & Brothers, Grosset & Dunlap, Inc., Little Brown & Co., Random House, Inc., The Viking Press, and Alfred A. Knopf, Inc.; among the university presses are those of Harvard, Yale, Princeton, Columbia, North Carolina, Texas, Minnesota, Oklahoma and Stanford.

Although the members of the Council are not directly concerned with the exhibition of motion pictures, they have a vital interest in the constitutional issue involved in this case because they believe, as stated by Mr. Chief Justice Warren, that the decision of this Court "presents a real danger of eventual censorship for every form of communication be it newspapers, journals, books, magazines, television, radio or public speeches." It is believed that the brief here appended presents in broader perspective the dangerous impact of the decision of this Court upon the public in general than will be presented by the parties themselves on this motion for rehearing.

WHEREFORE, it is respectfully urged that American Book Publishers Council, Inc. be granted leave to file herewith the appended brief as *amicus curiae*.

Respectfully submitted,

HORACE S. MANGES,  
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 Council, Inc.,  
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 New York 17, N. Y.

**Appendix A**

New York N. Y.  
February 3, 1961

HON. JOHN C. MELANDRY,  
CORPORATION COUNSEL  
CITY OF CHICAGO  
ILLINOIS

I AM COUNSEL TO AMERICAN BOOK PUBLISHERS COUNCIL CONSISTING OF ONE HUNDRED SIXTY-ONE OF THE LEADING BOOK PUBLISHERS AND UNIVERSITY PRESSES. I EARNESTLY REQUEST YOUR CONSENT IN CONNECTION WITH MOTION FOR RE-HEARING TO FILING A BRIEF AMICUS CURIAE FOR REVERSAL OF DECISION OF THE SUPREME COURT IN TIMES FILM CORPORATION V. CITY OF CHICAGO. KINDLY WIRE REPLY COLLECT.

HORACE S. MANGES  
60 East 42nd Street

IN THE  
**Supreme Court of the United States.**

**October Term, 1960**

**No. 34**

---

**TIMES FILM CORPORATION,**

*Petitioner,*

*against*

**CITY OF CHICAGO, RICHARD J. DALEY and,  
TIMOTHY J. O'CONNOR,**

*Respondents.*

---

**BRIEF OF AMERICAN BOOK PUBLISHERS  
COUNCIL, INC. AS AMICUS CURIAE**

---

**Interest of American Book Publishers Council, Inc.**

American Book Publishers Council, Inc. is a membership corporation composed of most of the leading publishers of books of general circulation and university presses. It is estimated that the 162 members of the Council publish and distribute over 90% of all general books. Among these publishers are Doubleday & Company, The Macmillan Company, McGraw-Hill Book Company, Charles Scribner's Sons, Harper & Brothers, Grosset & Dunlap, Inc., Little Brown & Co.; Random House, Inc., The Viking Press, and Alfred A. Knopf, Inc.; among the university presses are those of Harvard, Yale, Princeton, Columbia, North Carolina, Texas, Minnesota, Oklahoma and Stanford.

Although the members of the Council are not directly concerned with the exhibition of motion pictures, they have a vital interest in the constitutional issue involved in this case.

## Argument

The fact that four Justices of this Court have expressed fear that this decision "presents a real danger of eventual censorship for every form of communication be it newspapers, journals, books, magazines, television, radio or public speeches" is indicative of the devastating possibility that such fear may become widespread and may well tend to inhibit constitutionally protected expression and retard investment of capital and other forms of expansion and development in these vital communications media. This same concept was well expressed in an editorial comment on the Court's decision in this case in "The Commonwealth", issue of February 10th, as follows:

"The argument that movies are somehow 'specially censorable'—even though prior censorship of all other media is unconstitutional—we find unconvincing. The mass audience, the vividness of the communication, the tender age of those exposed to movies—all these conditions are met, to a greater or lesser degree, by other forms of modern communication. As the minority opinion asked, why should movies be singled out for government censorship by a society which fears and abhors state-controlled press or radio or communications systems generally?" (p. 496)

Unfortunately, the public becomes a major sufferer when timidity is encouraged in the field of communications media.

We respectfully ask this Court to re-examine the situation and determine whether the protection of the public contemplated by this decision cannot be achieved without the necessity of subjecting the public to this very real risk of depriving it of access to constitutionally protected expression in every medium of communication.

We call attention of this Court, as did the minority, to the Court's own decision in *Shelton v. Tucker*, — U. S. —, where Mr. Justice Stewart said:

“ \* \* \* even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.”

We urge most emphatically that pre-publication censorship is not necessary for the protection of the public against the danger of dissemination of obscenity. The very fact that only four states and fifteen municipalities have adopted laws similar to the Chicago ordinance is more than clear indication that pre-publication censorship is not necessary for the protection of the public. We submit that such protection can be and is adequately safeguarded by existing statutes prohibiting the exhibition of obscene motion pictures and the sale of obscene publications; and that therefore to permit such prior restraint would constitute an unwarranted encroachment on freedom of speech and press.

Basic to the protection of freedom of speech and press is the doctrine so aptly expressed by this Court in *Near v. Minnesota*, 283 U. S. 697, 716:

“The exceptional nature of its limitations places in a strong light the general conception that liberty of the press, historically considered and taken up by the Federal Constitution, has meant; principally, although not exclusively, immunity from previous restraints or censorship.”

While it is true that in the same case the Court stated that the protection as to previous restraint is “not absolutely unlimited,” it nevertheless also made this important observation:

“But the limitation has been recognized only in the exceptional cases.” (p. 716)

Although one of the exceptions noted in *Near* related to enforcing the “primary requirements of decency” against



obscene publications, it is significant that in *Roth v. United States*, 354 U. S. 476, 488. this Court said, by way of limitation of such exception:

"The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests."

A basic question here is whether the door is being left ajar by permitting *pre-publication censorship through an administrative official*, by way of a licensing statute, such as the Chicago ordinance.

We submit that loud and significant affirmative answers to that question have already been given by this Court. We refer specifically to two statements which it has made. The first of these appears in *Near v. Minnesota, supra*:

"Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege." (p. 720)

The second such statement, to which reference is made, is that of Mr. Justice Frankfurter in *Kingsley Books, Inc. v. Brown*, 354 U. S. 436, 441, where he stated for the Court:

" . . . the limitation is the exception; it is to be closely confined so as to preclude what may fairly be deemed licensing or censorship."

That statement was quoted by Mr. Chief Justice Warren in the dissenting opinion herein.

As a matter of fact, in *Kingsley Books, Inc. v. Brown, supra*, this Court, in sustaining the constitutionality of the

New York law permitting certain officials to institute an action to enjoin the distribution of obscene material, pointed out that the New York statute made provision for "adequate notice, judicial hearing and fair determination" which constituted "a safeguard against frustration of the public interest in effectuating judicial condemnation of obscene material" (p. 440).

And, in differentiating *Kingsley* from *Near v. Minnesota*, *supra*, Mr. Justice Frankfurter, writing for this Court, said, at p. 445:

"Unlike *Near*, Section 22-a is concerned solely with obscenity and, as authoritatively construed, it studiously withholds restraint upon matters not already published and not yet found to be offensive."

In condemnation of the radically different type of censorship statute—such as here present—we refer to the following comment of Mr. Justice Clark in *Joseph Burstyn, Inc., v. Wilson*, 343 U. S. 495, 503:

"The statute involved here does not seek to punish, as a past offense, speech or writing falling within the permissible scope of subsequent punishment. On the contrary, New York requires that permission to communicate ideas be obtained in advance from state officials who judge the content of the words and pictures sought to be communicated. This Court recognized many years ago that such a previous restraint is a form of infringement upon freedom of expression to be especially condemned. *Near v. Minnesota*, 283 U. S. 697, 75 L. ed. 1357, 51 S. Ct. 625 (1931). The Court there recounted the history which indicates that a major purpose of the First Amendment guaranty of a free press was to prevent prior restraints upon publication, although it was carefully pointed out that the liberty of the press is not limited to that protection."

We urge most respectfully that in sustaining the constitutionality of pre-publication censorship, this Court dis-

regarded its own admonition stated in *Roth* that the door barring intrusion into the fundamental freedoms of speech and press "must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests." Indeed, such pre-publication censorship, in the light of the existing statutes prohibiting the dissemination of publications which may be constitutionally suppressed, not only is not necessary "to prevent encroachment upon more important interests" but, actually, such pre-publication censorship itself encroaches upon the public's right of access to constitutionally permissible expression.

This much is clear—an erroneous denial of a license by an administrative official would violate the constitutional rights not only of the license applicant, but of the public. Not every applicant would be willing to assume the burden and incur the expense of a protracted litigation to establish that he was erroneously denied a license, and there would thus be suppression prior to publication without a judicial determination, in accordance with the requirements of due process of law, that the material may be constitutionally suppressed. Such suppression would affect not only the license applicant. The public, as well, would be denied access to the unconstitutionally suppressed material. It was such tendency "to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly" which led this Court to strike down the ordinance involved in *Smith v. California*, 361 U. S. 147, 154.

**CONCLUSION**

For the reasons hereinabove set forth, we respectfully urge that the motion for a rehearing be granted, and that upon such rehearing this Court adjudge unconstitutional Section 155-4 of the Municipal Code of the City of Chicago.

Respectfully submitted,

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MOTION FILED FEB 27 1961

JAMES H. BECK, Clerk

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1960

No. 34

TIMES FILM CORPORATION, *Petitioner,*

v.

CITY OF CHICAGO, et al., *Respondents*On Writ of Certiorari to the United States Court of Appeals  
for the Seventh Circuit

MOTION OF HMH PUBLISHING COMPANY, INC., PUBLISHERS OF PLAYBOY MAGAZINE, FOR LEAVE TO FILE BRIEF AMICUS CURIAE, AND BRIEF

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Dated: February 27, 1961

## INDEX

	Page
Motion of HMH Publishing Company, Inc., Publishers of Playboy Magazine, for Leave to File Brief Amicus Curiae .....	1
Brief Amicus Curiae for HMH Publishing Company, Inc., Publishers of Playboy Magazine .....	5
Introductory Statement .....	5
Argument .....	7
Clarification of the Opinion is Required .....	7
A. The Decision Urgently Requires Clarification on the Scope of Its Application to Communications Other Than Movies .....	8
B. The Decision Urgently Requires Clarification on Whether the Roth Standard, if Applied by a Policeman-Censor Instead of a Court, Is Constitutional .....	9
Given the Nature of Police Censorship, a Stricter and Clearer Standard is Required for the Police Censor Than Would Be Required for a Court .....	9
C. The Probable Course of Police Censorship Will Be to Gradually Broaden the Standard Used in Actual Operation. Thus the Police Censor Will Become a Clog on Communications in a Fashion Far More Formidable Than the Book Seller in the Smith Case .....	14
D. The Decision Urgently Requires Clarification on Whether Existing Censorship Procedures Must Conform to the Smith Case Requirement of the Use of Expert Testimony on Community Standards .....	15
E. Playboy and Other Publishers Cannot Afford to Await the Gradual Process of Clarification of the Opinion Through Subsequent Constitu-	

	Page
tional Adjudication. Playboy Will Be Disastrously Affected Economically If the Opinion is Not Clarified Promptly .....	17
Conclusion—"Promise To the Ear To Be Broken To the Hope" .....	20
Appendix .....	23

## CITATIONS

## CASES:

<i>One, Inc. v. Olesen</i> , 355 U.S. 371 (1958) .....	10, 18
<i>One, Inc. v. Olesen</i> , 241 F. 2d 772 (9th Cir., 1957) ...	11
<i>Roth v. United States</i> , 354 U.S. 476 (1957) ....	2, 7, 9, 10, 11, 12, 13, 14, 15, 18, 19, 20
<i>Smith v. California</i> , 361 U.S. 147 (1959) ...	7, 8, 15, 16, 17
<i>State of Vermont v. Verham News Corp.</i> , 121 Vt. 269, 155 A. 2d 872 (1959) .....	13
<i>Sunshine Book Co. v. Summerfield</i> , 355 U.S. 372 (1958) .....	10, 18
<i>Sunshine Book Co. v. Summerfield</i> , 128 F. Supp. 564 (D.C.D.C. 1955), 249 F. 2d 114 (D.C.Cir., 1957) ...	11
<i>Times Film Corp. v. Chicago</i> , 355 U.S. 35 (1957) ..	10, 18
<i>Times Film Corp. v. Chicago</i> , 244 F. 2d 432 (7th Cir., 1957) .....	11



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1960

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No. 34

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**TIMES FILM CORPORATION, *Petitioner***

**v.**

**CITY OF CHICAGO, et al., *Respondents***

---

**On Writ of Certiorari to the United States Court of Appeals  
for the Seventh Circuit**

---

**MOTION OF HMH PUBLISHING COMPANY, INC., PUB-  
LISHERS OF PLAYBOY MAGAZINE, FOR LEAVE TO  
FILE BRIEF AMICUS CURIAE**

---

HMH Publishing Company, Inc., publisher of Play-  
boy Magazine, hereby moves for leave to file the  
attached brief *amicus curiae* in No. 34, October Term  
1960, *Times Film Corporation, Petitioner v. City of  
Chicago, et al., Respondents*. Petitioner, Times Film  
Corporation, has consented to this motion.

HMH Publishing Company, Inc., publishes and sells  
throughout the United States a magazine called "Play-  
boy." A large part of Playboy's revenue is derived

from respectable and responsible nationwide advertisers. It has over a million circulation. It has been granted second class mailing privileges by the Postmaster General.

Playboy has a direct and substantial interest in this case because the majority opinion, if permitted to stand in its present form, can and probably will be widely interpreted to permit prior restraints by police censors to the printed word as well as to films. Moreover, the implication of the opinion is that the police may employ the standard of obscenity approved in *Roth v. United States*, 354 U.S. 476, 486 (1957)—material which has a “substantial tendency to deprave or corrupt . . . by inciting lascivious thoughts or arousing lustful desires” —but which has been qualified by the decisions on concrete materials which followed the *Roth* case. We are convinced that such a standard, while proper for a court, cannot be applied by the police in imposing a prior restraint, without in effect destroying any magazine of the character of Playboy.

Playboy is convinced that the widely circulated majority opinion will inspire the enactment of ordinances in many cities giving the police authority to censor magazines and to exercise prior restraint. Officials of the City of Chicago have already publicly announced such intention, and the city's corporation counsel has been quoted to the effect that he is about to crack down on pornographic magazines.

Playboy cannot survive the suspension of its publication by such prior restraints during the long interval while the matter is proceeding from state courts over the United States to this Court. Entire issues of the magazine will become worthless during such suspension. In addition, Playboy will lose all its revenues

from responsible and respectable national advertisers. Such advertisers are unwilling to take space in a magazine which has been condemned as obscene by any public body.

This brief presents the reasons why a magazine of the character of Playboy will, in effect, be destroyed by police prior restraints under ordinances which inevitably will be passed following the authority of the majority opinion in this case. We have also presented the reasons why the majority opinion will be construed by widely scattered police commissioners in such a way as to produce that result. We have indicated why we believe it imperative that the majority opinion be clarified.

We do not believe that the points contained in this brief will be adequately treated by the parties in this case or by the other *amici*. Playboy alone has the information and experience to present to the Court the practical effects which the majority opinion may have on a magazine of its character and which we do not believe were intended by the majority.

For the reasons given above, it is respectfully urged  
that the present motion be granted.

Respectfully submitted,

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208 South La Salle Street  
Chicago 4, Illinois

Dated: February 27, 1961

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1960

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No. 34

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**TIMES FILM CORPORATION, *Petitioner***

v.

**CITY OF CHICAGO, et al., *Respondents***

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**On Writ of Certiorari to the United States Court of Appeals  
for the Seventh Circuit**

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**BRIEF AMICUS CURIAE FOR HMH PUBLISHING  
COMPANY, INC., PUBLISHERS OF PLAYBOY MAGAZINE**

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**INTRODUCTORY STATEMENT**

Playboy Magazine has over a million circulation per month. Its newsstand sales exceed the combined newsstand sales per issue of *Time*, *Esquire*, *Holiday*, *Newsweek*, *New Yorker* and *Sports Illustrated*. It is sold in all the best hotels. The Postmaster General has granted it second class mailing privileges. A large part of its revenue comes from respectable nationwide advertisers of the type who are unwilling to take space in a magazine which has been condemned by any public agency as obscene. Readership surveys have shown that Playboy's readers rank extremely high in terms of educational level, job status, and expenditures for

such items as private homes and travel. Over 70% of Playboy's readers have attended college. Their average age is 29. Thirty-eight per cent are business officials, owners, managers and professional men. Another 25% are college students.

The magazine also produces a television program known as Playboy's Penthouse.

We have attached to this brief exhibits which illustrate the character of Playboy Magazine and its aims. It has been endorsed by such organizations as Older Youth Publications of the Methodist Church. (See Appendix, Exhibits 1 and 2). We recognize that the exhibits cannot be treated as evidence. Nevertheless they present a hypothetical case of the type of magazine which will be disastrously affected by the majority opinion if it is not clarified.

We argue in the name of Playboy. But everything said here in its name applies as much to any publisher of a newspaper, magazine, or book and to producers of movies and television programs. It is important to stress at the outset that the issues seriously affect the public interest in the free flow of communications. Playboy therefore is a true *amicus*.

Playboy's vulnerability to censorship is due to the fact that it publishes jokes which though they are of a kind commonly told at mixed gatherings are nevertheless offensive to extremists. It also publishes a photo of an attractive girl in color in each issue, designated as "Playmate of the Month." For this reason it has had vivid experiences with the hazards of prior censorship.

## ARGUMENT

### CLARIFICATION OF THE OPINION IS REQUIRED

Playboy requests this Court to clarify the opinion in such a way that it will not trigger a rash of prior restraints on the ground of alleged obscenity imposed by police officers and other types of extremists who occupy censorship positions. The editors of Playboy are convinced that the magazine could not survive under such attacks, even though a court subsequently held that the prior restraints were unjustified.

We argue only that it is essential that the majority opinion be clarified. The critical point about the majority opinion is not that it is wrong if properly construed, but that it is misleading. If it stands unchanged it is certain to cause irreparable harm to the free flow of communication before it can be clarified through the slow process of constitutional adjudication.

As Mr. Justice Frankfurter said in his concurring opinion in *Smith v. California*, 361 U.S. 147, 161-162 (1959):

"I am no friend of deciding a case beyond what the immediate controversy requires, particularly when the limits of constitutional power are at stake. On the other hand, a case before this Court is not just a case. *Inevitably its disposition carries implications and gives directions beyond its particular facts.*" (emphasis supplied)

The several respects in which the Court's opinion requires clarification are:

1. Does the opinion necessarily apply to newspapers, magazines and books as well as to movies?

2. Does the opinion mean that the standards of the *Roth* case if applied not by a Court but by a policeman-censor are constitutional?



3. Does the opinion mean that existing censorship procedures, without the use of expert testimony as dictated by the *Smith* case, are nevertheless constitutional?

**A. THE DECISION URGENTLY REQUIRES CLARIFICATION ON THE SCOPE OF ITS APPLICATION TO COMMUNICATIONS OTHER THAN MOVIES.**

The Court in its opinion is careful to state that it goes no further than to decide the validity of a prior restraint on the exhibition of movies. It further says that it is not concerned with the validity of the standards to be applied by the police commissioner under the Chicago code. We quote:

"As to what may be decided when a concrete case involving a specific standard provided by this ordinance is presented, we intimate no opinion. The petitioner has not challenged all—or for that matter any—of the ordinance's standards. Naturally we could not say that every one of the standards, including those which Illinois' highest court has found sufficient, is so vague on its face that the entire ordinance is void. At this time we say no more than this—that we are dealing only with motion pictures and, even as to them, only in the context of the broadside attack presented on this record."

It is clear from this that the Court is not deciding the validity of any prior restraint to the printed word. But the *reasoning* of the opinion as opposed to its limited scope has equal application both to magazines and the movies. In limiting its decision the Court clearly indicates that there may be a distinction in the application of prior restraints between movies and printed material. But it is difficult for one interpreting the application of the opinion to *Playboy Magazine* to understand what that distinction can be.

The only plausible distinction between movies and the press with respect to prior restraints is that a delay in exhibiting motion pictures while the validity of the restraint is being tested in court might not cause irreparable injury. Indeed, the publicity attendant upon a prior restraint of a movie might increase its patronage. Movies carry no advertising material, whereas, in the case of a monthly magazine, prior restraint might destroy the continuity of successive issues and damage national advertising revenues for some time to come. Thus the balancing of the public and private interests would be different in the case of magazines. But how is anyone interpreting the opinion to know that the Court has this in mind?

Certainly the reasoning of the majority and the implication of the opinion indicates that a prior restraint is just as permissible if a magazine or newspaper is sufficiently indecent as in the case of movies.

**B. THE DECISION URGENTLY REQUIRES CLARIFICATION ON WHETHER THE ROTH STANDARD, IF APPLIED BY A POLICE MAN-CENSOR INSTEAD OF A COURT, IS CONSTITUTIONAL.**

**Given the Nature of Police Censorship, a Stricter and Clearer Standard Is Required for the Police Censor Than Would Be Required for a Court.**

The implication and the direction of the opinion seems to endow a police censor rather than a court with the power to apply the standards of obscenity laid down in the *Roth* case as a basis for a prior restraint. The majority opinion states:

“... The petitioner has not challenged all—or for that matter any—of the ordinance’s standards. *Naturally we could not say that every one of the standards, including those which Illinois’ highest court has found sufficient, is so vague on its face that the entire ordinance is void.*” (emphasis supplied)

This appears to be a direct holding that a prior restraint may be exercised by a police commissioner without judicial approval, and that the only remedy the exhibitor of a suppressed movie has is to try the case in court, unable to show his movie while the proceeding is pending. It is, of course, possible that this Court did not decide that a police commissioner could exercise prior restraints without first obtaining the approval of a court, but it is hard to make such an inference from the opinion in the present case because Times Film refused to show its film to the police.

Assuming then that the police may be made the censors, what standards should they apply? The foregoing quotation from the Times Film opinion indicates by implication that the police may apply the same standards as a court. This follows from this Court's observation in the present case that every one of the standards in the ordinance cannot be so vague that the ordinance is void on its face. Certainly, if any of the standards are valid, the standard of "obscenity" is. The Court defined the standard of obscenity in the *Roth* case as a "substantial tendency to deprave or corrupt . . . by inciting lascivious thoughts or arousing lustful desires." (*Roth v. United States*, 354 U.S. 476, 486 (1957)).

This therefore is the test which the policeman must have in mind. But the policeman must also interpret the following per curiam reversals on the authority of the *Roth* case.

*One, Inc. v. Olesen*, 355 U.S. 371 (1958).

*Sunshine Book Co. v. Summerfield*, 355 U.S. 372 (1958)

*Times Film Corp. v. Chicago*, 355 U.S. 35 (1957).

In *One, Inc.*, the Court of Appeals for the Ninth Circuit characterized the material as "obscene and filthy . . . offensive to the moral senses, morally depraving and debasing . . . designed for persons having lecherous and salacious proclivities" (241 F.2d 772, at 778). In *Times Film Corp.*, the Court of Appeals for the Seventh Circuit characterized the movie as "from beginning to end . . . supercharged with a current of lewdness generated by a series of illicit sexual intimacies and acts . . . We do not hesitate to say that the calculated purpose of the producer of this film, and its dominant effect, are substantially to arouse sexual desires" (244 F.2d 432, at 436).

In the third case, *Sunshine Book Co. v. Summerfield*, 128 F. Supp. 564 (D.C.D.C. 1955), 249 F.2d 114 (D.C. Cir., 1957), the District Court (Judge Kirkland) followed meticulously the standards laid down by the majority opinion in the *Roth* case. He examined each nude in the magazine and tried to analyze which would cause prurient thoughts. He condemned some and passed others and finally held that the magazine as a whole was obscene.

Yet in each of the cases, despite the vigorous characterization of the court below, this Court reversed without opinion.

It would appear therefore that to come within the lustful thoughts test of the *Roth* case the material would have to be so shocking as to amount to what Justice Harlan, quoting the Solicitor General, referred to in the *Roth* case as "hard core pornography" (354 U.S. at 507).

Yet the implications of the opinion in the present case are that a policeman may be given the power to suspend the sale of a magazine and destroy its value

on his own interpretation of the *Roth* and the subsequent cases. The kind of interpretation by the police which is likely to result can be predicted from the character of the public bodies to whom the power of prior restraints is entrusted by the majority opinion. We incorporate in the Appendix attached hereto excerpts from an article in *Newsweek Magazine*, February 13, 1961, page 89, in which some of these censors are described (Appendix, Exhibit 3). In Atlanta, Georgia, the censor is a 50-year old lady, the wife of an alderman, who last year barred Atlantans from seeing such movies as *Room At The Top* (nominated as one of the outstanding movies of 1959 in connection with the Hollywood "Oscar" awards); *Birth of a Nation* (a film classic about the Civil War), and *Never on Sunday* (a film which has been warmly praised in New York and other large cities). In Chicago the censors are policemen's housewives. In Lake Forest, Illinois, the names of the censors are secret!

We are confident that if the majority opinion is not clarified Playboy will find itself fighting for its life before censors scattered throughout the United States who interpret the opinion to mean that they have the power to bar Playboy from sale according to their own notions of what they think will arouse lustful thoughts. There is little doubt that, encouraged by the majority opinion, ordinances will be passed all over the United States endowing censors with that power. We have no doubt that Playboy would finally gain a victory before this Court after being suppressed for an indefinite time by prior restraints in every city where an ordinance authorizing that practice is passed. But that victory would coincide in time with Playboy's funeral.

We believe that the majority, when the issues are presented to it in more concrete form, will say that the

doctrine of prior censorship is intended to apply only to the most shocking cases—in the case of obscenity, only to hard core pornography. Short of that, the issue of obscenity should be left to a court's decision after the magazine has been sold. We believe that this Court is going to say that a stricter and more definite standard must be applied by the police when they exercise prior restraints than by a court in a prosecution on account of the sale of a magazine. We do not believe that this Court, when the issue is squarely before it, will authorize the police to impose a prior restraint on their own interpretation of the standards of obscenity laid down in the *Roth* case. We rather believe that an ordinance authorizing a prior restraint on the judgment of the police would have to be extremely definite. In the case of obscenity the test might be "hard core pornography." Looser words may be well enough when the magazine can continue its sale while the prosecution goes on. The only case that *Playboy* has ever been called on to defend under these circumstances arose when a newsdealer was indicted in Vermont. After a decision of the Supreme Court of Vermont couched entirely in procedural terms, *State of Vermont v. Verham News Corp.*, 121 Vt. 269, 155 A.2d 872 (1959), this case was *nolle prossed* by the State Attorney General shortly before trial. There was some inconvenience and expense to *Playboy* as a result, but if there had been a prior restraint the damage to *Playboy* would have been irreparable.

The reason for our belief that the application of the prior restraint rule will be limited by this Court when the issue comes squarely before it is that the purpose of the rule is to avoid outrageous and shocking cases rather than to give the police the power to ban borderline or risqué material.



We may be right or wrong on these predictions of the future action of this Court. But of one thing we are sure, and it is that the city councilmen and legislators, who are even now studying the widely-publicized opinion in the present case prior to passing prior restraint measures, will not take the view we have outlined above.

**C. THE PROBABLE COURSE OF POLICE CENSORSHIP WILL BE TO GRADUALLY BROADEN THE STANDARD USED IN ACTUAL OPERATION. THUS THE POLICE CENSOR WILL BECOME A CLOG ON COMMUNICATIONS IN A FASHION FAR MORE FORMIDABLE THAN THE BOOK SELLER IN THE SMITH CASE.**

Not only will the use of the *Roth* standard by a policeman-censor be dangerously broader than its use by a court, but the practice of prior censorship by the police or bureaucrats will tend inexorably over time to expand the standard actually used. Such expansion will result from the interaction of two forces, as the history of censorship abundantly shows. First, there will be the inherent momentum of censorship to resolve doubts against material seeking approval; second, there will be the efforts of publishers or producers to conciliate the censor and to negotiate with him to avoid trouble and delay in marketing an artistic product. The result will be an ever expanding net of censorship which will go far beyond the nominally narrow

<sup>1</sup> Officials of the City of Chicago announced immediately after publication of the Court's opinion on January 23, 1961, that the ordinance would be revised. *Chicago Daily News*, Tuesday, January 24, 1961, page 5; *Chicago American*, Tuesday, January 24, and Wednesday, January 25, page 9. The *Chicago Sun-Times*, January 26, 1961, page 42, reports that "Chicago authorities are now turning attention to the problem of censoring pornographic magazines sold on newsstands. Corporation Counsel John Melaniphy is about to crack down . . ."



bounds of the *Roth* standard. See as an example the excerpt from *Newsweek* in the appendix to this brief.

In *Smith v. California*, 361 U.S. 147 (1959) this Court showed a notable concern with the indirect consequences of turning booksellers into censors through the imposition of strict criminal liability upon them. As the Court said (361 U.S. at 153):

"By dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter. For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature."

It will be remarkable indeed if the Court should show concern over the clog in free communications that would result from the bookseller taking care as to what books he will risk selling, and yet not show at least an equal concern over the clog on communications that will certainly result from the policeman-censor standing astride the very threshold of publication.

**D. THE DECISION URGENTLY REQUIRES CLARIFICATION ON WHETHER EXISTING CENSORSHIP PROCEDURES MUST CONFORM TO THE SMITH CASE REQUIREMENT OF THE USE OF EXPERT TESTIMONY ON COMMUNITY STANDARDS.**

There is also, as a constitutional matter, a serious procedural ambiguity in the type of censorship the Court now appears to be authorizing. The Court must recognize that police censorship as practiced in the United States is on an extremely informal basis satisfying few if any of the norms of administrative law.

(See the *Newsweek* excerpt, Appendix, Exhibit 3). Particularly acute as a constitutional problem will be other implications of *Smith v. California*, *supra*. In the *Smith* case the trial court had excluded expert testimony as to community standards over the objections of the defendant. Both Justice Harlan and Justice Frankfurter in separate concurring opinions voted to reverse the conviction of the defendant on the grounds that the exclusion of such evidence was an unconstitutional deprivation of due process under the Fourteenth Amendment. As Justice Frankfurter stated (361 U.S. at 165-166):

"There is no external measuring rod for obscenity. Neither, on the other hand, is its ascertainment a merely subjective reflection of the taste or moral outlook of individual jurors or individual judges. Since the law through its functionaries is 'applying contemporary community standards' in determining what constitutes obscenity, *Roth v. United States*, 354 US 476, 489, it surely must be deemed rational, and therefore relevant to the issue of obscenity, to allow light to be shed on what those 'contemporary community standards' are. Their interpretation ought not to depend solely on the necessarily limited, hit-or-miss, subjective view of what they are believed to be by the individual juror or judge. It bears repetition that the determination of obscenity is for juror or judge not on the basis of his personal upbringing or restricted reflection or particular experience of life, but on the basis of 'contemporary community standards.' Can it be doubted that there is a great difference in what is to be deemed obscene in 1959 compared with what was deemed obscene in 1859? The difference derives from a shift in community feeling regarding what is deemed prurient or not prurient by reason of the effects attributable to this or that particular writing. Changes in the

intellectual and moral climate of society, in part doubtless due to the views and findings of specialists, afford shifting foundations for the attribution. What may well have been consonant 'with mid-Victorian morals, does not seem to me to answer to the understanding and morality of the present time.' *United States v. Kennerley* (DC NY) 209 F 119, 120. This was the view of Judge Learned Hand decades ago reflecting an atmosphere of propriety much closer to mid-Victorian days than is ours. Unless we disbelieve that the literary, psychological or moral standards of a community can be made fruitful and illuminating subjects of inquiry by those who give their life to such inquiries, it was violative of 'due process' to exclude the constitutionally relevant evidence proffered in this case."

If the use of expert testimony when offered has become a constitutional requirement in a criminal trial, it must *a fortiori* be a constitutional requirement in any proceedings before a policeman-censor. We submit therefore that it is highly doubtful if any existing prior restraint censorship procedure in the United States satisfies the constitutional procedural requirements for the use of expert testimony laid down in the *Smith* case.

**E. PLAYBOY AND OTHER PUBLISHERS CANNOT AFFORD TO AWAIT THE GRADUAL PROCESS OF CLARIFICATION OF THE OPINION THROUGH SUBSEQUENT CONSTITUTIONAL ADJUDICATION. PLAYBOY WILL BE DISASTROUSLY AFFECTED ECONOMICALLY IF THE OPINION IS NOT CLARIFIED PROMPTLY.**

We believe that an extremely probable interpretation of the majority opinion by persons and officials interested in censorship would achieve the following results: Police commissioners or censors all over the United States with the extreme views which such per-

sons always have would be authorized to stop the sale of Playboy on grounds of obscenity under ordinances similar to the one in this case.

We have no doubt that Playboy would ultimately prevail on the merits against the charge of obscenity, and that the prior restraints imposed by the police would be set aside by any court which properly applied the standards of the *Roth* case as interpreted by this Court in the memorandum decisions which followed it, such as *One, Inc.*, *Times. Film* and *Sunshine Book*, discussed above.

But Playboy's victory in such a case would come too late for the following reasons: Playboy is a monthly magazine. An issue of Playboy becomes valueless when the month has expired. A greater part of Playboy's sales, as is the case with most magazines, are at the first of the month. A prior restraint would destroy or grievously impair the value of an entire issue. In addition, the attendant publicity would interrupt the continuity of successive issues and destroy the advertising revenues for succeeding issues. Playboy is not to be classified with a growing number of magazines like *One, Inc.* and many others which barely pass the test of the *Roth* case. Such magazines are shipped by express. They have no second class mailing privileges. They carry no respectable national advertising. What advertising they have is cheap and obnoxious.

By contrast, all of Playboy's advertising revenue is derived from respectable nationwide advertisers of the kind appearing in *Time*, *Life* and *The New Yorker*. These advertisers, for reasons which must be apparent to the Court, are unwilling to take space in any magazine which has been condemned as obscene by any

public body or whose month-to-month continuity is uneasy on this score.

A prior restraint suspending the publication of Playboy until it was reversed by some court properly applying the *Roth* case would disastrously impair its circulation among subscribers and probably destroy all its national advertising revenues for months to come, as well as confiscating the entire value of the issue which had been suspended.

Playboy has had experience with that sort of harassment by the Postmaster General. The Postmaster General, without notice, on at least two occasions ordered the local postmaster not to mail the magazine pending determination of whether it had any obscene content. Playboy's counsel had only a few hours' notice to request a court stay of the Postmaster General's order pending the administrative hearing. Had any of these stays been refused, enabling the Postmaster General to delay the mailing of the magazine until a hearing on obscenity, the result would have been disastrous even if Playboy won. It was only because the United States District Court for the District of Columbia never failed to grant a stay with respect to each issue under attack that the magazine survived. Some indication of the time interval which would have been involved in a post office administrative proceeding is revealed by Exhibit 4 in the Appendix, which is the final order in one of the cases.

The Postmaster General after repeated attempts two years ago to impose prior restraints on Playboy is now satisfied that the magazine meets all tests of decency. He has granted Playboy second class mailing privileges. But in the past Playboy's economic future has hung on the chance that it could obtain a stay of a prior restraint within twenty-four hours.

Playboy was able to meet the attacks of the Postmaster General only because a stay could be obtained in a single court in the District of Columbia, which had studied and understood and properly applied the standards of obscenity. If, as a consequence of the majority opinion, the *Roth* test can be applied by any police commissioner in any large city in the United States, counsel for Playboy will be completely powerless to protect it.

### CONCLUSION

#### "Promise To the Ear To Be Broken To the Hope"

We are fully aware of the burden of an *Amicus Curiae* in requesting the Court to clarify its opinion. If this were not a case where the implications of a narrowly written opinion threaten to trigger a series of ordinances which may well destroy Playboy's economic future, we would not have the temerity to approach this Court. Playboy will be forced to litigate in any number of cities. The sale of its magazine will be forbidden while litigation is going on. These are not fancied fears. Playboy was compelled to fight for its life with the Postmaster General until he finally became convinced that he could not exercise what was in effect a prior restraint by forbidding the use of the mails. In defense of his conduct it may be said that the pressures from extreme lovers of decency were very great. Those same pressures exist in every city in the United States. The voice of the censor is a powerful one, particularly in these times of change in contemporary standards which are not yet accepted by a powerful minority. No city councilman or state legislator wants to vote against a measure which appears to be in the interest of decency. And so we believe that in practical effect the opinion as it stands will amount to the grant of power to state and city censors to destroy



magazines like *Playboy* by enjoining them in accordance with their own private notions of decency.

Magazines of a lower character than *Playboy* which are sent by express and which have no significant advertising revenue contain nothing but the cheapest sort of illiterate writing. *Playboy* pays top prices for writers like Carl Sandburg, John Steinbeck, H. Allen Smith, Evelyn Waugh, Max Shulman, P. G. Wodehouse, Nelson Algren, Budd Schulberg, Ben Hecht, Vance Packard, Erskine Caldwell, John Collier, John Crosby, Woolcott Gibbs, Ian Fleming, Marion Hargrove, James Jones, Garson Kanin, Jack Kerouac, John Lardner, Leonard Lyons, Philip Wylie, Dr. Theodore Reik, Alberto Moravia and many others. Its expenses are heavy and its organization far-flung. Lower grade magazines will, therefore, not be irreparably injured if they are suspended for a while. They can reappear only with minor losses. But *Playboy* cannot survive the long road that lies between court decisions in no one knows how many cities and states and the final opinion of the Supreme Court of the United States. Reluctant as we realize this Court must be to clarify any opinion at the request of an *amicus curiae*, we believe that in this extraordinary case simple justice requires it.

We repeat: The difficulty with the Court's opinion in our view is not that it is wrong but that it is misleading. In the bluntest terms, in ratifying censorship in the abstract, the Court has invited censorship which it will be forced to hold unconstitutional in any of the forms in which it will concretely appear. It has, as Justice Jackson noted in paraphrasing *Macbeth* in another connection, made a "promise to the ear to be broken to the hope."



Perhaps if the opinion stands as rendered, in another decade of constitutional adjudication it will become sufficiently clarified and its holding will become sufficiently narrowed. But in that interim, irreparable harm will be done not only to Playboy but to other publishers of magazines and books and to the producers of movies and perhaps television programs as well, and in the end to the free flow of communications in the United States.

It is the responsibility of this Court to cancel the invitation to censorship that its opinion appears to generate and it is its responsibility to cancel the invitation now—before the rash of ordinances and statutes destined for unconstitutionality have had the chance to play havoc with the Arts.

For the reasons given, a rehearing should be granted so that the majority opinion may be clarified.

Respectfully submitted,

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**APPENDIX****EXHIBIT 1**

THE METHODIST CHURCH

EDITORIAL DIVISION—BOARD OF EDUCATION

201 EIGHTH AVENUE, SOUTH, NASHVILLE 3, TENNESSEE

June 23, 1959

Mr. Jack J. Kessie, Associate Editor  
**PLAYBOY**

232 East Ohio Street  
 Chicago 11, Illinois

Dear Mr. Kessie:

Last month a number of churchmen, professionally responsible for working with young adults, met in Chicago for a consultation on how to do a better job of attracting these persons to the churches. On the list of "recommended reading" were several issues of **PLAYBOY**. Why? Because—contrary to much popular opinion—many church leaders have a pretty clear idea of what interests young adults. The Starch Report on **PLAYBOY** made it evident that you have them in sharp focus, also. Obviously, we won't offer the young male reader the same fare. But we don't kid ourselves into thinking that healthy young men are sexless, either. And if **PLAYBOY**'s readers are the better educated persons that they appear to be, they will have a more-than-academic interest in religion—provided it is not a pink tea and cookie affair.

For the past half dozen years, the constituent churches of the National Council of Churches have been trying to draw a bead on persons in the 18-to-28 age range. To that end, several national consultations have been held, following which the churches have attempted to develop programs and publications which will speak with directness and urgency to young adults. We are all too aware that we still don't have the answer, for this is the period of "the big dropout" in most denominations. But there is more experimentation and fewer of the expected answers at

this age than at any other. Perhaps some of the new paperback books in the "Faith For Life Series" for young adults will ring a bell with them. (I'm chairman of the National Council's curriculum committee that produces these.)

Would you be interested in an 1800-word feature, possibly entitled "You're on the Churches' Wanted List," which would summarize the churches' efforts to come up with an interesting, helpful, and unhackneyed program for young adults? It could include a description of the profile of young adults as the churches see them; indicate the kinds of activities that young adult groups across America are carrying on under church auspices; and suggest ways in which the readers—if they are interested—can influence the churches to develop a realistic and effective program.

If this idea appeals to you—or if it suggests another article possibility—please indicate a desirable length for the manuscript and any special points that you would like to see developed. Also, will you please indicate the probable honorarium for such an article.

Cordially yours,  
 FRED CLOUD  
 Fred Cloud, Editor  
 Older Youth Publications

(By "older youth" we mean persons 18 to 23, in college, working, and in the armed forces. We hope to change this unflattering label for the age group soon.)

## EXHIBIT 2

COLLEGE OF JOURNALISM AND COMMUNICATIONS  
UNIVERSITY OF ILLINOIS, URBANA

September 23, 1958

Mr. Victor Lowmes III  
Vice President  
PLAYBOY  
232 East Ohio  
Chicago 11, Illinois

Dear Mr. Lowmes:

You will be interested in learning, I hope, that the revised edition of my *Magazines in the Twentieth Century*, just now being released, carries a short history and evaluation of *Playboy*. As I think I told you when you commented on the omission from the first edition, *Playboy* did not seem worth including when the original manuscript went to the printers three years ago. Its life expectancy seemed too short, frankly, and its quality too doubtful.

I am delighted that I have been a poor guesser on both counts. In several talks in the past year, one of which is enclosed, I have mentioned *Playboy* as evidence of vitality in the magazine industry. Hugh Hefner's experience with *Playboy*, I think, is significant far beyond his personal success. Hef has demonstrated that the newcomer of ingenuity can still found a successful magazine on a lot of courage and energy and on very little financial outlay—a situation encouraging to the free trade in ideas. He has also demonstrated that readers will pay a fairly substantial sum for a publication they really want.

I have been impressed by the steady upgrading of *Playboy's* content. In some ways, I am afraid, *Playboy* is unfortunately paying a penalty for its own success. As you well know, it spawned a flock of imitators, none of which has approached it in quality and some of which were close to pornographic. Persons who have never bothered to

read *Playboy*, I suspect, have sometimes lumped it with the least of its brethren. So there exists a stereotype of *Playboy* which has very little to do with the present reality.

Best wishes.

Sincerely,

TED PETERSON  
Theodore Peterson  
Dean

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**EXHIBIT 3—NEWSWEEK MAGAZINE.**

**FEBRUARY 13, 1961, p. 89**

**CENSORSHIP: WHO BANS WHAT**

For sixteen years Mrs. Christine Smith Gilliam has been deciding what Atlanta may or may not see or hear at the movies. A reporter who called on her at her neat white cottage last week found Mrs. Gilliam and her alderman husband playing a Mozart duet on the piano and violin. Mrs. Gilliam, a 50ish redhead, was asked about her job. "I believe in being flexible," she said. "The word for a female dog is perfectly acceptable when applied to a female dog. But I cut out a scene of a man applying the term for a female dog to his wife in a conversation with his mistress. I'm having a big hassle right now trying to cut out two 'bastards' and a 'by God' from a British movie.

Last year Mrs. Gilliam banned eleven movies, including "Room at the Top," "Birth of a Nation," and "Never on Sunday." But as she spoke last week, for the first time she had reassurance from the Supreme Court that she was in business legally.\* "I don't know all the legal implications of the Supreme Court decision," said Mrs. Gilliam, "but apparently it rejects the basic argument that movies and press are legally one and the same as far as censorship

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\* By a squeaky 5-4 margin, the Court on Jan. 23 upheld the censor's right to see and license a film before it is publicly shown.

goes. We still may be challenged on the ground on which we ban a particular picture, but not on our right to ban. I have felt for years that 'prior restraint' was correct, and I'm glad the Supreme Court has said it."

**RELIEVED:** There are now close to 60 state and city movie censors in the United States, and, like Mrs. Gilliam, all of them this week were breathing more easily than they had in years. Roughly 50 cities now have active censorship boards, about twenty of which are run or dominated by policemen. Four states—New York, Kansas, Maryland, and Virginia—also have censorship. A number of other states are considering bills to let them put movies into one of two categories: For everybody, or for adults only.

Besides the public censors, the Johnston Office of the Motion Picture Producers Association gives or withholds its seal from every U.S. movie—and the seal determines whether a picture can be shown in MPA member theaters (which are in the majority) or to the armed forces. Lastly, there are such organizations as the Legion of Decency, which can proscribe films for Catholics, and the Protestant National Council of Churches, which reads scripts in advance and has effectively discouraged a number from being produced.

But in the present movie market, in which the American moviemaker gets half of his income from foreign showings of his films, the foreign censor is also a power to be reckoned with. Last July, for example, "Private Property," about a rape, was forbidden in its dubbed version in France, although the original version was OK'd. In August, actor-producer Burt Lancaster was offered the chance to cut six words from "Elmer Gantry" to get it shown in Canada's Ontario Province, and chose to be banned, not cut. In November, England's censor came to Hollywood to tell Americans how to tailor their movies for British consumption: (What he said, in effect: Don't worry about sex, but tone down the violence.) Last year Holland banned "Guys

and Dolls"; the censor felt it might offend sensitive members of the Salvation Army.

\* **CRITERIA:** The question of just who passes judgment on movies in this country and what the criteria are is wildly complex. New York requires its censors to be civil servants with a M.A. degree. Chicago's censors rotate, but are generally policemen's widows; the head censor there is a police sergeant who recently declared: "If a picture is objectionable for a child, it is objectionable, period." In Lake Forest, Ill., the censors' very names are kept from the public. The head censor in Memphis, Tenn., is a housewife who recently wrote: "I have heard twice in pictures a word I have never heard used before. S-l-u-t." In Evanston, Ill., a policewoman censors movies in her spare time, for \$180 a year.

Censors generally base their bans on the charge of obscenity. Nonetheless, there are many other prohibitions in law: Depicts "train robberies" (Sioux City, Iowa); shows "any female in a drunken state, unless reduced to a flash" (Birmingham, Ala.); might "promote . . . sectional prejudices" (Houston, Texas). There is also the shock factor: Chicago ordered a scene from Walt Disney's "Vanishing Prairie" deleted because it showed the birth of a buffalo. Top industry censor, the Johnston Office, takes its cue from "established morality,"—a way of saying it often winks at its own rules.

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**EXHIBIT 4**

POST OFFICE DEPARTMENT  
WASHINGTON, D. C.

June 4, 1958

H. E. Docket No. 4/84

In the Matter of  
HMH PUBLISHING COMPANY, INC.

for the entry of "Playboy" magazine as second-class mail  
matter at Chicago, Illinois

**Order**

The above proceeding was instituted on February 9, 1956, by the filing of a Motion to Show Cause why the Respondent publishing company should not be granted second class privileges. The Respondent moved for a more definite statement of the charges which motion was granted by the Hearing Examiner. Over two years ago the Petitioner stated in a memorandum to the Chief Hearing Examiner that such would be supplied "as soon as possible." Nothing having been furnished, the Respondent moved to dismiss this proceeding on May 9, 1958. June 2, 1958, was the date set for Reply to this motion by the Petitioner. No reply having been made, the Motion of the Respondent is granted. Second class privileges are granted to the Respondent publisher effective the date of his application.

(Signed) CHARLES D. ABLARD  
Judicial Officer

FILE COPY

MOTION FILED FEB 28 1961

Office of the Clerk, U.S.

FILED

MAR 10 1961

JAMES P. BREWSTER, Clerk

IN THE  
**Supreme Court of the United States**  
October Term, 1960

No. 34

**TIMES FILM CORPORATION,**

*Petitioner,*

—v.—

**CITY OF CHICAGO, RICHARD J. DALEY and  
TIMOTHY J. O'CONNOR,**

*Respondents.*

ON CERTIORARI FROM THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

**MOTION FOR LEAVE TO FILE BRIEF ON BEHALF  
OF THE AUTHORS LEAGUE OF AMERICA, INC.,  
AS AMICUS CURIAE, AND BRIEF AS AMICUS  
CURIAE IN SUPPORT OF PETITION FOR  
REHEARING**

**THE AUTHORS LEAGUE OF AMERICA, INC.**  
**Irwin Karp**  
120 Broadway  
New York 5, New York  
*Counsel*

## INDEX

	PAGE
Motion for Leave to File Brief as Amicus Curiae ..	1
Position and Interest of Amicus Curiae, The Authors League of America, Inc. ....	3
Argument .....	4
I. Chicago was not entitled to select censorship, because other measures were available to pre- vent the showing of obscene motion pictures without broadly restricting freedom of expres- sion of all motion picture producers .....	4
A. The Court Should Determine the Constitu- tionality of the Ordinance "in the Light of Less Drastic Means of Achieving the Same Purpose" .....	4
B. The Ordinance is Unconstitutional because it "Broadly Stifle(s) Fundamental Personal Liberties When the End Can Be More Nor- mally Achieved * * * (By) Less Drastic Means * * * " .....	9
II. An ad hoc balancing of the risks of censor- ship and the risks of speech, free of censorship is foreclosed by the First Amendment .....	15
Conclusion .....	17
Certificate of Counsel .....	18

TABLE OF CASES CITED

Joseph Burstyn, Inc. v. Wilson, 343 U. S. 495 . . . .	6, 12, 14
Kingsley Books, Inc. v. Brown, 354 U. S. 436 . . .	4, 9, 10, 13, 16
Near v. Minnesota, 283 U. S. 697 . . . . .	6, 8, 15, 16
Roth v. United States, 354 U. S. 476 . . . . .	4, 9, 10, 13, 17
Shelton v. Tucker, 364 U. S. 479 . . . . .	5, 6, 7

OTHER MATERIAL CITED

Dewey "The Living Thoughts of Thomas Jefferson"	16
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IN THE  
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ON CERTIORARI FROM THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

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**MOTION FOR LEAVE TO FILE BRIEF ON BEHALF  
OF THE AUTHORS LEAGUE OF AMERICA, INC.,  
AS AMICUS CURIAE**

The Authors League of America, Inc. hereby respectfully moves for leave to file a brief, appended hereto, as *amicus curiae*, in support of Petitioner's Petition for Rehearing.

Petitioner has consented. On February 3, 1961 movant's counsel, by letter, requested consent of the Respondents' attorney. No reply has been received; and the Authors League's counsel was advised, in a telephone conversation with an Assistant Corporation Counsel in Chicago on February 23, 1961, that Respondents' attorney had not been in the City for several days and would not return until

February 24th or 25th, and that no reply could be expected to movant's request until then. On February 27, 1961 movant's counsel again attempted without success to reach respondents' attorney to obtain his consent.

The Authors League of America, Inc., organized under the Membership Corporation Law of New York in 1912, is an organization of professional writers and dramatists. One of its principal purposes is to express the view of its more than 4,000 members on issues involving freedom of press and speech. The decision by the Court is of fundamental concern to authors and dramatists upon whom the burden of all censorship and restraint ultimately falls. Because its members have such a direct interest in the extent to which rights of speech may be regulated in motion pictures and in any other medium, permission is respectfully requested to file the annexed brief, *amicus curiae*.

Respectfully submitted,

IRWIN KARP,

Attorney for The Authors  
League of America, Inc.

120 Broadway

New York 5, N. Y.

February 27, 1961

IN THE  
**Supreme Court of the United States**

**October Term, 1960**

**No. 34**

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**TIMES FILM CORPORATION,**

*Petitioner,*

—v.—

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ON CERTIORARI FROM THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

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**BRIEF OF THE AUTHORS LEAGUE OF AMERICA,  
INC., AS AMICUS CURIAE**

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**Interest of Amicus**

The Authors League of America, Inc. is an organization of some four thousand professional writers and dramatists. Many of its members have either written for motion pictures, or have had their books and plays adapted as motion pictures. As authors, the members of the Authors League are deeply concerned with statutes and regulations restraining the right of free expression through the media of books, plays and motion pictures.



The League files this brief in support of the Petition for Rehearing because it believes that it is incompatible with the First Amendment to permit any state the luxury of choosing censorship when alternative, narrowly confined, remedies are available to prevent the showing of an obscene motion picture and because it believes that if the state may thus turn its back on techniques far more compatible with the First Amendment in dealing with obscenity, it may also do so when it purports to deal with libel, inflammatory words or other "prohibited classes of speech" and thus extend prior restraint, by censorship, into every area of speech: political, economic and social.

We respectfully urge that the Petition for Rehearing be granted, and that on Rehearing the Ordinance be declared invalid as a violation of the First and Fourteenth Amendments to the Constitution.

**I. Chicago was not entitled to select censorship, because other measures were available to prevent the showing of obscene motion pictures without broadly restricting freedom of expression of all motion picture producers.**

**A. The Court Should Determine the Constitutionality of the Ordinance "in the Light of Less Drastic Means of Achieving the Same Purpose".**

Certainly, since *Roth v. United States* (354 U. S. 476) and *Kingsley Books, Inc. v. Brown* (354 U. S. 436), the alternatives facing the City of Chicago have not been: censorship—or the unrestrained showing of obscene motion pictures. The choice facing the City has been between alternative means of preventing the showing of obscene

motion pictures, a choice between: measures under which a restraint is placed only on motion pictures that are obscene, by open judicial process—and censorship which places a restraint on all motion pictures.

The Court now holds that although the showing of obscene motion pictures (or those containing other restrainable classes of speech) may be prevented by means which do not impose wholesale restriction on free speech, the State may deliberately turn its back on these techniques, deliberately put aside the preservation of rights—favored, if no longer guaranteed, by the First Amendment—and instead deliberately select censorship, with its attendant evils.

Although the choice of “remedy” by the City spells the difference between the preservation or widespread diminution of free expression in an important medium of communication, the Court disposes of the constitutional issues raised by the choice, saying:

“ . . . It is not for the Court to limit the state in its selection of the remedy it deems most effective to cope with such a problem.”

But this approach contradicts the many opinions, involving freedom of speech and press, in which the Court has most definitely limited the state in its selection between alternative remedies; where a state was denied the right to select the alternative which demanded the greatest, rather than the least, sacrifice of personal rights and liberties. As Mr. Justice Stewart said, in *Shelton v. Tucker*, 364 U. S. 479, 488:

“In a series of decisions this Court has held that, even though the governmental purpose be legitimate

and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means of achieving the same purpose."

In these decisions the Court did not bar itself, as it does here, from making an independent and searching appraisal of the States's choice, simply because the state concluded that it had picked the most "effective" weapon. Mr. Justice Stewart said, in *Shelton*:

"In holding the ordinances invalid, the Court (in *Schneider v. State*, 308 U. S. 147) noted that where legislative abridgement of 'fundamental personal rights and liberties' is asserted 'the courts should be astute to examine the effects of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions', 308 U. S. at 161." (364 U. S. at p. 489)

Here there is all the more reason for the Court to "astutely" examine the "legislative abridgement \* \* \* in the light of less drastic means for achieving the same basic purpose"—since the abridgment is censorship. Ever since *Near v. Minnesota* (283 U. S. 697), the Court has affirmed and reaffirmed that prior restraint would be tolerated "only in exceptional cases". In *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495, the court, once more affirming this position, declared that a state "has a heavy burden to

demonstrate that the limitation (on motion pictures) challenged here presents such an 'exceptional case' " (343 U. S. 504).

We respectfully submit that the stakes are too high, and the margin for error by the states too great, for the Court to accept at face value the state's judgment that a broad incursion on personal liberties, by censorship or otherwise, is "necessary", and that something less subversive of the First Amendment will not serve the same purpose. The so-called choice of remedy is the very crux of the matter; it determines the difference between the preservation or diminution of free speech. If the court is foreclosed by the state's "selection of remedy" from determining whether the right of free speech has been sacrificed out of sheer necessity, because there was no other way of meeting the problem—or whether it was simply a matter of convenience or poor judgment—then the state is in effect granted the power to judge its own actions under the First Amendment.

The decisions cited in *Shelton v. Tucker, supra*, remind us that legislative bodies are sometimes prone to jump, almost gladly, to the conclusion that a general limitation of free speech is necessary. And occasionally, we would respectfully submit, one of the reasons for selecting censorship is that those who choose happen to believe that it is, in itself, a desirable instrument of social control, and that it possesses the advantages of flexibility, and of a persuasiveness with regard to content, that has no relation to the ostensible "standards" fixed for the censor nor for the "narrow objectives" which he is supposed to pursue.

Here, for example, is not the case of a City which, anxious to avoid censorship, had hopefully tested the alternative methods of limited injunctive remedy and criminal statutes; and had reluctantly resorted to censorship only when it had determined pragmatically that no other method could possibly work. A limited injunction statute was never adopted. Nor does it appear that Chicago determined by its own or any other state's experience, that the zealous enforcement of criminal obscenity statutes, repeated convictions under these statutes, the imposition of heavy penalties and jail sentences, failed to deter subsequent exhibition of obscene films; nor did it confirm by actual experience that increasing penalties to eliminate any possibility of profits from obscene films (e.g., confiscation of all profits or receipts derived from the exhibition of a film convicted as obscene, or doubling or tripling such an amount, as a penalty) would be ineffective.

The need to examine the premises of "necessity" with the greatest care is illustrated by *Near v. Minnesota, supra*. There the Court said that prior restraint on the press might be necessary in wartime to prevent the disclosure of military information and secrets. This declaration is a sort of first principle which supports all subsequent demonstrations that prior restraint may become so indispensable in "exceptional cases" that it would have to, out of sheer necessity, be imposed despite the mandate of the First Amendment.

Yet during four and one-half years of World War II, during the Korean War, during the fourteen years of the "Cold War" years of countless military secrets (including the Atom Bomb), new weapons, thousands of "saling

dates of transports" and troop dispositions—it was possible to survive without imposing any censorship on the Country's magazines, books, motion picture or other media of communication. Chief Justice Hughes' premises, so logically unassailable, was substantially modified in the laboratory of actual experience.

**B. The Ordinance is Unconstitutional because it "Broadly Stifle(s) Fundamental Personal Liberties When the End Can Be More Normally Achieved \* \* \* (By) Less Drastic Means \* \* \*".**

We respectfully submit that Chicago has not, and could not, carry the burden of demonstrating that "an exceptional case" exists permitting censorship. We submit that the choice of this device which concededly "broadly stifle(s) fundamental personal liberties" cannot be justified "in the light of less drastic means for achieving the same basic purpose."

In so far as "obscenity" is concerned,\* the only purpose which Chicago could pursue by its system of censorship would be the identical purpose that it would be entitled to pursue by statutes providing for injunction, seizure and destruction (*Kingsley Books, Inc. v. Brown*, 354 U. S. 436)—i.e., to prevent the showing of those motion pictures in which "the dominant theme of the material taken as a whole appeals to prurient interest" (*Roth v. United States*, 354 U. S. at 476). It does not appear from the majority opinion that the permissible objective has been enlarged to

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\* Our discussion focuses on "obscenity" because the prevention of this evil is advanced by the City, and accepted by the Court, as the principal purpose of the ordinance. But the same reasons which, we believe, make it unconstitutional when applied to "obscenity", make it unconstitutional when applied to any other class of speech in motion pictures beyond the pale of the First Amendment.



now permit the state to restrain, by censorship, motion pictures that could not be punished as obscene under *Roth* or enjoined under *Kingsley Books, Inc.*

If Chicago's censorship is aimed only at obscenity as thus defined, and is no more ambitious in scope, then the same objective can be effectively secured by the "limited injunctive remedy" sanctioned by *Kingsley Books, Inc. v. Brown*, 354 U. S. 436, 439; for if Illinois and Chicago adopt that remedy, they have it in their power to restrain any motion picture accused of obscenity from being exhibited in Chicago from the day an action is commenced, until a Court has determined whether it is obscene, and if it is, then forever (354 U. S. at p. 437).

Of all means of communication, motion pictures are most easily regulated by this procedure. A motion picture is exhibited publicly (obviously censorship would be ineffective against bootlegged pornographic films shown privately, and never submitted to the censor). Advance advertising informs the City, as well as the public, when and where it will be shown. Unlike other media of communication, motion pictures have small initial exposure to an audience: while a magazine or newspaper may reach into hundreds of thousands of homes in Chicago on a single afternoon, and a radio or television program will be heard at the moment of broadcast in millions of homes, a motion picture is only shown, in its initial "first run" performance to an infinitesimally small segment of any community's population at one time. The largest downtown theatre in Chicago, The Chicago, holds approximately 4,000 people\*. The popu-

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\* Petitioner's film would probably have been shown at a smaller theatre.



lation of Chicago is approximately 3,500,000. Assuming that this theatre were filled in the first showing, a motion picture would be seen by .0013% of the City's population; if the picture ran for two performances before a prosecutor were able to prepare a complaint and obtain a preliminary injunction (354 U. S. 436), the picture would have been seen by .0026% of the City's population.

Even if it be argued that such a *de minimis* exposure is so dangerous that it cannot be tolerated, the City still does not require general censorship; to protect the .0026% of the population; it need only see the picture at the theatre a day or two days before its public showing in order to decide whether to seek an injunction. At most, it requires a "first look"; not the right to review and the power to issue or withhold permits.

The average motion picture must be shown in most communities for several days or weeks (certainly never just one or two days) in order to recoup its large investment and to earn any profit. Because its economic success depends upon its continued exhibition in the community, any premature termination of its "run" by injunction or seizure would be ruinous; certainly if the same film were attacked under the obscenity statutes of several states. It is unrealistic to assume that motion picture producers and theatre owners are prone to risk the possibility of ruin, to say nothing of fine and imprisonment, by showing films in which the "dominant theme of the material taken as a whole appeals to prurient interest". That a great majority of states today do not resort to censorship indicates to some extent that the conventional penal statutes, certainly as implemented by injunctive procedures process, are sufficient to prevent

obscurity in its true sense. There is no indication that in these non-censorship states, there has been a wave of convictions of "obscene" motion pictures, evidencing a tendency of motion picture producers, uninhibited by censorship, to run amuck.

In denying that motion pictures have any greater "propensity" than newspapers, television or books to purvey true obscenity, we do not question that some (or several) motion pictures, like some (or several) newspapers, television programs and books, are coarse, vulgar or tasteless. But as we understand the previous decisions of this Court, censorship would not be tolerated if its candidly avowed purpose were to suppress such aberrations rather than actual obscenity; it would be impossible to tailor any system of censorship or other governmental control aimed at removing these objectionable features from motion pictures, or any other medium of expression, which would not at the same time stifle them completely, and eviscerate the First Amendment.

The majority opinion repeats the reference made in *Joseph Burstyn, Inc. v. Wilson, supra*, to motion pictures' "capacity for evil". Possibly this reflects a judgment by the Court that the motion picture is a more effective stimulus than other media, when dealing with sexual themes, obscenely; but even assuming that it has such a psychological effect (and the evidence is, to say the least, sparse and contradictory), censorship and its peculiar "capacity for evil" and mischief (so well documented and established) cannot be justified, when other less drastic means are available to prevent the exhibition of obscene motion pictures.

In terms of stimulus and motivation, the press, radio, television and books have an equal, if not greater, "capacity for evil" with respect to every other class of unprotected speech.

Certainly the ordinance as written, and presumably as it will continue to be enforced,\* imposes a general restriction on the freedom of expression in the motion picture medium; in contrast with the very narrow impact of criminal statutes (*Roth*) and injunctive statutes (*Kingsley Books, Inc.*) whose sanctions are imposed only on the particular publisher or work charged with obscenity in the Courts. (Cf. *Brown v. Kingsley Books*, 1 N. Y. 2d 177, at 185; *affd. sub. nom. Kingsley Books, Inc. v. Brown*, 354 U. S. 436.) It requires universal submission, review and licensing; and punishes any exhibition without a permit by fine; it does not merely require a review of motion pictures to be shown to audiences including children (for classification purposes); nor conversely does it exclude from review those motion pictures which are to be shown only to adult audiences. Nor does it merely seek to give the City a "first look", so that it may swiftly pursue obscene motion pictures in the courts under criminal or injunctive statutes.

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\* While the Court declared that it was "not holding that City officials may be granted the power to prevent the showing of any motion picture they deem unworthy of a license", no reservation was expressed as to those provisions which require a permit and impose fines for the offense of exhibiting without a permit. It is not clear whether the Court is approving only a portion of the ordinance (the terms which require a review) and withholding judgment, or condemning, the remainder (the punitive fines for non-licensed exhibitions). If the Court is in fact holding that the City may only look at the picture and no more, we respectfully implore that this be made clear; for undoubtedly the decision will be read as a sanction for a full-fledged system of censorship—complete with permit and fine.

Censorship has no less a restrictive effect on motion pictures than it would have in any other media, such as the press, where it would still be condemned if imposed today to prevent the publication of libel, sedition or, we assume, obscenity. Its essential restrictive characteristics and capacities for abuse do not change because it is at work on motion pictures rather than on newspapers or books. Nor can its restrictive effects be condoned or (realistically) diminished by narrowing its "objective" or drawing its "standards" precisely. It has never been suggested that censorship becomes less restrictive or constitutionally less objectionable, when applied to the press, in proportion to the narrowness of its objective or the meticulousness of its standards.

Certainly, if techniques short of censorship are effective to prevent the showing of obscene motion pictures, then the right of free speech of motion picture producers still deserves protection against that restriction. It does not appear from the majority opinion that motion picture producers, as a class have now had their rights of free speech reclassified to a lower order than those enjoyed by authors and publishers in other media; presumably the Court's ruling in *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495 still prevails; the rights of free speech are guaranteed to motion picture producers, and these rights do not vary from the rights of other organs of expression (343 U. S. at pp. 502-503). That all motion picture producers (or newspaper publishers, or radio broadcasters) may have to submit to censorship in "exceptional cases" does not alter the fact that censorship invades their freedom of expression when an "exceptional case" is not made out.

## II. An *ad hoc* balancing of the risks of censorship and the risks of speech, free of censorship is foreclosed by the First Amendment.

Once a "capacity for evil" is postulated, the case for censorship is practically completed; certainly so, if the state is to decide whether the prior restraint of censorship is the most effective remedy against the particular evil.

While a "capacity for evil" has, so far, only been attributed to motion pictures; and, hypothetically, to the press in war time (cf. *Near v. Minnesota, supra*), strong arguments have been made that other media have a potential for other evils; for example:

"It is a melancholy truth, that a suppression of the press could not more completely deprive the nation of its benefits, than is done by its abandoned prostitution to falsehood. Nothing can now be believed which is seen in a newspaper. Truth itself becomes suspicious by being put into that polluted vehicle. The real extent of this state of misinformation is known only to those who are in situations to confront facts within their knowledge with the lies of the day.

. . .

"Such an editor too, would have to set his face against the demoralising practice of feeding the public mind habitually on slander, and the depravity of taste which this nauseous aliment induces. Defamation is becoming a necessary of life; insomuch, that a dish of tea in the morning or evening cannot be digested without this stimulant. Even those who do not believe these abominations, still read them with complaisance to their auditors, and instead of the abhorrence and indignation which should fill a virtuous mind, betray a secret pleasure in the pos-

sibility that some may believe them, though they do not themselves." Thomas Jefferson (Quoted in Dewey "The Living Thoughts of Thomas Jefferson" pages 120-121; Fawcett Publications Edition.)

If Jefferson's appraisal of the "capacity for evil" of the press were widely enough accepted, why would not the inexorable force of the Court's syllogism (proceeding from the premise of that capacity) justify the establishment of censorship of newspapers to prevent the pollution of truth or "the demoralizing practice of feeding the public mind habitually on slander". After all, more than the sexual habits and values of nations have been threatened in the past by corrupt and powerful media of expression; the very existence of societies has been destroyed through propaganda.

The First Amendment avoids the logical dilemma involved in an *ad hoc* approach to balancing the risks of censorship and the risks of speech, free of censorship. We submit that the judgment of the First Amendment—foreclosing censorship in absolute terms—is as pragmatic, valid and sensible a judgment now, as when it was first made. Balancing the known "capacity for evil" of censorship against the inevitable postulation of evils, from time to time, in various areas of speech and various media—sometimes valid, sometimes exaggerated, sometimes without substance—the Amendment decides that the greater evil is inevitably, and always, censorship (and the Court has heretofore acted to minimize the risk of that decision (*Roth v. United States, supra*; *Kingsley Books, Inc. v. Brown, supra*)).

So far the judgment of the Amendment has proven sounder than any contrary view. The country has survived



war and external danger without recourse to the censorship that was assumed in *Near* might be indispensable; just as most states are now surviving whatever risk of obscenity there may be in motion pictures, without censorship.

Certainly, as a political and philosophical solution to the vexing problem of the risks of free speech, the First Amendment does not represent an absolute truth; but it is one solution. And, we submit that it is the solution of absolute prohibition against censorship. Another solution would be an *ad hoc* balancing of the risks of censorship against the risks of speech, uninhibited by censorship, in motion pictures and other media (and with regard to sex, politics, personal reputation, or any other subject). Such a solution could replace that offered by the First Amendment; but if it is to do so, we respectfully submit that it should be done by amending the Amendment.

## CONCLUSION

It is respectfully submitted that the petition for rehearing be granted and, that on rehearing, the ordinance be declared unconstitutional.

Respectfully submitted,

IRWIN KARP

120 Broadway

New York 5, N. Y.

*Counsel for The Authors League  
of America Inc., Amicus Curiae*



**Certificate of Counsel**

I hereby certify that I am counsel for the amicus curiae The Authors League of America, Inc. and that the foregoing brief in support of the petition for rehearing is in my opinion well founded in law and fact and is proper to be filed herein and is presented in good faith and not for delay.

Respectfully submitted,

IRWIN KARP

# SUPREME COURT OF THE UNITED STATES

No. 34.—OCTOBER TERM, 1960.

Times Film Corporation,	}	On Writ of Certiorari to the
Petitioner,		United States Court of
v.		Appeals for the Seventh
City of Chicago, et al.		Circuit.

[January 23, 1961.]

MR. JUSTICE CLARK delivered the opinion of the Court.

Petitioner challenges on constitutional grounds the validity on its face of that portion of § 155-4<sup>1</sup> of the Municipal Code of the City of Chicago which requires submission of all motion pictures for examination prior to their public exhibition. Petitioner is a New York corporation owning the exclusive right to publicly exhibit in Chicago the film known as "Don Juan." It applied for a permit as Chicago's ordinance required and tendered the license fee but refused to submit the film for examination. The appropriate city official refused to issue the permit and his order was made final on appeal to the Mayor. The sole ground for denial was petitioner's refusal to submit the film for examination as required. Petitioner then brought this suit seeking injunctive relief ordering the issuance of the permit without submission of the film and restraining the city officials from interfering with the exhibition of the picture. Its sole ground is that the provision of the ordinance requiring submission of the film constitutes, on its face, a prior restraint within the prohibition of the First and Fourteenth Amendments. The District Court dismissed the complaint on the grounds, *inter alia*, that neither a substantial federal question nor even a

<sup>1</sup> The portion of the section here under attack is as follows:

"Such permit shall be granted only after the motion picture film for which said permit is requested has been produced at the office of the commissioner of police for examination or censorship."

## 2 TIMES FILM<sup>®</sup>CORP. v. CITY OF CHICAGO.

justiciable controversy was presented. 180 F. Supp. 843. The Court of Appeals affirmed, finding that the case presented merely an abstract question of law since neither the film nor evidence of its content was submitted. 272 F. 2d 90. The precise question at issue here never having been specifically decided by this Court, we granted certiorari. 362 U. S. 917 (1960).

We are satisfied that a justiciable controversy exists. The section of Chicago's ordinance in controversy specifically provides that a permit for the public exhibition of a motion picture must be obtained; that such "permit shall be granted only after the motion picture film for which said permit is requested has been produced at the office of the commissioner of police for examination"; that the Commissioner shall refuse the permit if the picture does not meet certain standards;<sup>2</sup> and that in the event of such refusal the applicant may appeal to the Mayor for a

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<sup>2</sup> That portion of § 155-4 of the Code providing standards is as follows:

"If a picture or series of pictures, for the showing or exhibition of which an application for a permit is made, is immoral or obscene, or portrays depravity, criminality, or lack of virtue of a class of citizens of any race, color, creed, or religion and exposes them to contempt, derision, or obloquy, or tends to produce a breach of the peace or riots, or purports to represent any hanging, lynching, or burning of a human being, it shall be the duty of the commissioner of police to refuse such permit; otherwise it shall be his duty to grant such permit.

"In case the commissioner of police shall refuse to grant a permit as hereinbefore provided, the applicant for the same may appeal to the mayor. Such appeal shall be presented in the same manner as the original application to the commissioner of police. The action of the mayor on any application for a permit shall be final."

It should be noted that the Supreme Court of Illinois, in an opinion by Schaefer, C. J., has already considered and rejected an argument against the same Chicago ordinance, similar to the claim advanced here by petitioner. The same court also sustained certain of the standards set out above. *American Civil Liberties Union v. City of Chicago*, 3 Ill. 2d 334, 121 N. E. 2d 585 (1954).

*de novo* hearing and his action shall be final. Violation of the ordinance carries certain punishments. The petitioner complied with the requirements of the ordinance, save for the production of the film for examination. The claim is that this concrete and specific statutory requirement, the production of the film at the office of the Commissioner for examination, is invalid as a previous restraint on freedom of speech. In *Joseph Burstyn, Inc., v. Wilson*, 343 U. S. 495, 502 (1952), we held that motion pictures are included "within the free speech and free press guaranty of the First and Fourteenth Amendments." Admittedly, the challenged section of the ordinance imposes a previous restraint, and the broad justiciable issue is therefore present as to whether the ambit of constitutional protection includes complete and absolute freedom to exhibit, at least once, any and every kind of motion picture. It is that question alone which we decide. We have concluded that §155-4 of Chicago's ordinance requiring the submission of films prior to their public exhibition is not, on the grounds set forth, void on its face.

Petitioner's narrow attack upon the ordinance does not require that any consideration be given to the validity of the standards set out therein. They are not challenged and are not before us. Prior motion picture censorship cases which reached this Court involved questions of standards.<sup>3</sup> The films had all been submitted to the authorities and permits for their exhibition were refused because of their content. Obviously, whether a particular

<sup>3</sup> *Joseph Burstyn, Inc., v. Wilson*, *supra* ("sacrilegious"); *Gelling v. Texas*, 343 U. S. 960 (1952) ("prejudicial to the best interests of the people of said City"); *Commercial Pictures Corp. v. Regents*, 346 U. S. 587 (1954) ("immoral"); *Superior Films, Inc., v. Department of Education*, 346 U. S. 587 (1954) ("harmful"); *Kingsley International Pictures Corp. v. Regents*, 360 U. S. 684 (1959) ("sexual immorality").

#### 4 TIMES FILM CORP. v. CITY OF CHICAGO

statute is "clearly drawn," or "vague," or "indefinite," or whether a clear standard is in fact met by a film are different questions involving other constitutional challenges to be tested by considerations not here involved.

Moreover, there is not a word in the record as to the nature and content of "Don Juan." We are left entirely in the dark in this regard, as were the city officials and the other reviewing courts. Petitioner claims that the nature of the film is irrelevant, and that even if this film contains the basest type of pornography, or incitement to riot, or forceful overthrow of orderly government, it may nonetheless be shown without prior submission for examination. The challenge here is to the censor's basic authority; it does not go to any statutory standards employed by the censor or procedural requirements as to the submission of the film.

In this perspective we consider the prior decisions of this Court touching on the problem. Beginning over a third of a century ago in *Gitlow v. New York*, 268 U. S. 652 (1925), they have consistently reserved for future decision possible situations in which the claimed First Amendment privilege might have to give way to the necessities of the public welfare. It has never been held that liberty of speech is absolute. Nor has it been suggested that all previous restraints on speech are invalid. On the contrary, in *Near v. Minnesota*, 283 U. S. 697, 715-716 (1931), Chief Justice Hughes, in discussing the classic legal statements concerning the immunity of the press from censorship, observed that the principle forbidding previous restraint "is stated too broadly, if every such restraint is deemed to be prohibited. . . . [T]he protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases." These included, the Chief Justice found, utterances creating "a hindrance" to the Government's war effort, and "actual obstruction to its recruiting

service or the publication of the sailing dates of transports or the number and location of troops." In addition, the Court said that "the primary requirements of decency may be enforced against obscene publications" and the "security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government." Some years later a unanimous Court, speaking through Mr. Justice Murphy, in *Chaplinsky v. New Hampshire*, 315 U. S. 568, 571-572 (1942), held that there were "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Thereafter, as we have mentioned, in *Joseph Burstyn, Inc., v. Wilson*, *supra*, we found motion pictures to be within the guarantees of the First and Fourteenth Amendments, but we added that this was "not the end of our problem. It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places." At p. 502. Five years later, in *Roth v. United States*, 354 U. S. 476, 483 (1957), we held that "in light of . . . history it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance." Even those in dissent found that "freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it." *Id.*, at 514. And, during the same Term, in *Kingsley Books, Inc., v. Brown*, 354 U. S. 436, 441 (1957), after characterizing *Near v. Minnesota*, *supra*, as "one of the landmark opinions" in its area, we took notice that *Near* "left no doubts that 'Liberty of speech, and of the press, is also not an absolute right . . .

6 TIMES FILM CORP. v. CITY OF CHICAGO.

the protection even as to previous restraint is not absolutely unlimited.' . . . The judicial angle of vision," we said there, "in testing the validity of a statute like § 22-a [New York's injunctive remedy against certain forms of obscenity] is 'the operation and effect of the statute in substance.'" And as if to emphasize the point involved here, we added that "The phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test." Even as recently as our last Term we again observed the principle, albeit in an allied area, that the State possesses some measure of power "to prevent the distribution of obscene matter." *Smith v. California*, 361 U. S. 147, 155 (1959).

Petitioner would have us hold that the public exhibition of motion pictures must be allowed under any circumstances. The State's sole remedy, it says, is the invocation of criminal process under the Illinois pornography statute, Ill. Rev. Stat. (1959), c. 38, § 470, and then only after a transgression. But this position, as we have seen, is founded upon the claim of absolute privilege against prior restraint under the First Amendment—a claim without sanction in our cases. To illustrate its fallacy we need only point to one of the "exceptional cases" which Chief Justice Hughes enumerated in *Near v. Minnesota*, *supra*, namely, "the primary requirements of decency [that] may be enforced against obscene publications." Moreover, we later held specifically "that obscenity is not within the area of constitutionally protected speech or press." *Roth v. United States*, 354 U. S. 476, 485 (1957). Chicago emphasizes here its duty to protect its people against the dangers of obscenity in the public exhibition of motion pictures. To this argument petitioner's only answer is that regardless of the capacity for, or extent of such an evil, previous restraint cannot be justified. With this we cannot agree. We recognized in *Burstyn, supra*, that "capacity for evil . . . may be



relevant in determining the permissible scope of community control," at p. 502, and that motion pictures were not "necessarily subject to the precise rules governing any other particular method of expression. Each method," we said, "tends to present its own peculiar problems." At p. 503. Certainly petitioner's broadside attack does not warrant, nor could it justify on the record here, our saying that—aside from any consideration of the other "exceptional cases" mentioned in our decisions—the State is stripped of all constitutional power to prevent, in the most effective fashion, the utterance of this class of speech. It is not for this Court to limit the State in its selection of the remedy it deems most effective to cope with such a problem, absent, of course, a showing of unreasonable strictures on individual liberty resulting from its application in particular circumstances. *Kingsley Books, Inc., v. Brown, supra*, at p. 441. We, of course, are not holding that city officials may be granted the power to prevent the showing of any motion picture they deem unworthy of a license. *Joseph Burstyn, Inc., v. Wilson, supra*, at 504–505.

As to what may be decided when a concrete case involving a specific standard provided by this ordinance is presented, we intimate no opinion. The petitioner has not challenged all—or for that matter any—of the ordinance's standards. Naturally we could not say that every one of the standards, including those which Illinois' highest court has found sufficient, is so vague on its face that the entire ordinance is void. At this time we say no more than this—that we are dealing only with motion pictures and, even as to them, only in the context of the broadside attack presented on this record.

*Affirmed.*

# SUPREME COURT OF THE UNITED STATES

No. 34.—OCTOBER TERM, 1960.

Times Film Corporation,	} On Writ of Certiorari to the	
Petitioner,		United States Court of
v.		Appeals for the Seventh
City of Chicago, et al.	} Circuit.	

[January 23, 1961.]

MR. CHIEF JUSTICE WARREN, with whom MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, dissenting.

I cannot agree with either the conclusion reached by the Court or with the reasons advanced for its support. To me, this case clearly presents the question of our approval of unlimited censorship of motion pictures before exhibition through a system of administrative licensing. Moreover, the decision presents a real danger of eventual censorship for every form of communication be it newspapers, journals, books, magazines, television, radio or public speeches. The Court purports to leave these questions for another day, but I am aware of no constitutional principle which permits us to hold that the communication of ideas through one medium may be censored while other media are immune. Of course each medium presents its own peculiar problems, but they are not of the kind which would authorize the censorship of one form of communication and not the others. I submit that in arriving at its decision the Court has interpreted our cases contrary to the intention at the time of their rendition and, in exalting the censor of motion pictures, has endangered the First and Fourteenth Amendment rights of all others engaged in the dissemination of ideas.

*Near v. Minnesota*, 283 U. S. 697, was a landmark opinion in this area. It was there that Chief Justice

## 2 TIMES FILM CORP. v. CITY OF CHICAGO.

Hughes said for the Court "that liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship." *Id.*, at 716. The sole dissenter in *Near* sought to uphold the Minnesota statute, struck down by the Court, on the ground that the statute did "not authorize administrative control in advance such as was formerly exercised by the licensors and censors. . . ." *Id.*, at 735. Thus, three decades ago, the Constitution's abhorrence of licensing or censorship was first clearly articulated by this Court.

This was not a tenet seldom considered or soon forgotten. Five years later, a unanimous Court observed:

"As early as 1644, John Milton, in an 'Appeal for the Liberty of Unlicensed Printing,' assailed an act of Parliament which had just been passed providing for censorship of the press previous to publication. He vigorously defended the right of every man to make public his honest views 'without previous censure'; and declared the impossibility of finding any man base enough to accept the office of censor and at the same time good enough to be allowed to perform its duties." *Grosjean v. American Press Co.*, 297 U. S. 233, 245-246.

Shortly thereafter, a unanimous Court once more recalled that the "struggle for the freedom of the press was primarily directed against the power of the licensor." *Lovell v. Griffin*, 303 U. S. 444, 451. And two years after this, the Court firmly announced in *Schneider v. State*, 308 U. S. 147:

"[T]he ordinance imposes censorship, abuse of which engendered the struggle in England which eventuated in the establishment of the doctrine of the freedom of the press embodied in our Constitution. To require a censorship through license which

makes impossible the free and unhampered distribution of pamphlets strikes at the very heart of the constitutional guarantees." *Id.*, at 164.

Just twenty years ago, in the oft-cited case of *Cantwell v. Connecticut*, 310 U. S. 296, the Court, again without dissent, decided:

"[T]he availability of a judicial remedy for abuses in the system of licensing still leaves that system one of previous restraint which, in the field of free speech and press, we have held inadmissible. A statute authorizing previous restraint upon the exercise of the guaranteed freedom by judicial decision after trial is as obnoxious to the Constitution as one providing for like restraint by administrative action." *Id.*, at 306.

This doctrine, which was fully explored and was the focus of this Court's attention on numerous occasions, had become an established principle of constitutional law. It is not to be disputed that this Court has stated that the protection afforded First Amendment liberties from previous restraint is not absolutely unlimited. *Near v. Minnesota, supra*. But, licensing or censorship was not, at any point, considered within the "exceptional cases" discussed in the opinion in *Near*. *Id.*, at 715-716. And, only a few Terms ago, the Court, speaking through Mr. Justice FRANKFURTER, in *Kingsley Books, Inc., v. Brown*, 354 U. S. 436, reaffirmed that "the limitation is the exception; it is to be closely confined so as to preclude what may fairly be deemed *licensing or censorship*." *Id.*, at 444 (Emphasis added.)

The vice of censorship through licensing and, more generally, the particular evil of previous restraint on the right of free speech have many times been recognized when this Court has carefully distinguished between laws establishing sundry systems of previous restraint on the right of

#### 4 TIMES FILM CORP. v. CITY OF CHICAGO.

free speech and penal laws imposing subsequent punishment on utterances and activities not within the ambit of the First Amendment's protection. See *Near v. Minnesota*, *supra*, at pp. 718-719; *Schneider v. State*, *supra*, at p. 164; *Cantwell v. Connecticut*, *supra*, at p. 306; *Niemotka v. Maryland*, 340 U. S. 268, 282 (concurring opinion); *Kunz v. New York*, 340 U. S. 290, 294-295.

Examination of the background and circumstances leading to the adoption of the First Amendment reveal the basis for the Court's steadfast observance of the proscription of licensing, censorship and previous restraint of speech. Such inquiry often begins with Blackstone's assertion: "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published." 4 Bl. Comm. 151. Blackstone probably here referred to the common law's definition of freedom of the press;<sup>1</sup> he probably spoke of the situation existing in England after the disappearance of the licensing systems but during the existence of the law of crown libels. There has been general criticism of the theory that Blackstone's statement was embodied in the First Amendment, the objection being "that the mere exemption from previous restraints cannot be all that is secured by the constitutional provisions"; and that "the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a by-word, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish

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<sup>1</sup> The following charge to the grand jury by Chief Justice Hutchinson of Massachusetts in 1767 defines the common-law notion of freedom of the press:

"The Liberty of the Press is doubtless a very great blessing; but this liberty means no more than a Freedom for every Thing to pass from the Press without License." Quincy, Reports of Cases Argued and Adjudged in the Superior Court of Judicature of the Province of Massachusetts Bay, Between 1761 and 1772, 241.

him for harmless publications." 2 Cooley, Const. Lim., 8th ed., p. 885." *Near v. Minnesota*, *supra*, at p. 715; *Grosjean v. American Press Co.*, *supra*, at p. 248. The objection has been that Blackstone's definition is too narrow; it had been generally conceded that the protection of the First Amendment extends at least to the interdiction of licensing and censorship and to the previous restraint of free speech. *Near v. Minnesota*, *supra*, at p. 715; *Grosjean v. American Press Co.*, *supra*, at p. 246; Chafee, Free Speech in the United States, 18.

On June 24, 1957, in *Kingsley Books, Inc., v. Brown*, *supra*, the Court turned a corner from the landmark opinion in *Near* and from one of the bases of the First Amendment. Today it falls into full retreat.

I hesitate to disagree with the Court's formulation of the issue before us, but, with all deference, I must insist that the question presented in this case is *not* whether a motion picture exhibitor has a constitutionally protected, "complete and absolute freedom to exhibit, at least once, any and every kind of motion picture." — U. S. —. Surely, the Court is not bound by the petitioner's conception of the issue or by the more extreme positions that petitioner may have argued at one time in the case. The question here presented is whether the City of Chicago—or, for that matter, any city, any State or the Federal Government—may require all motion picture exhibitors to submit all films to a police chief, mayor or other administrative official, for licensing and censorship prior to public exhibition within the jurisdiction.

The Court does not even have before it an attempt by the city to restrain the exhibition of an allegedly "obscene" film, see *Roth v. United States*, 354 U. S. 476. Nor does the city contend that it is seeking to prohibit the showing of a film which will impair the "security of community life" because it acts as an incitement to "violence and the overthrow by force of orderly government." See *Near v. Minnesota*, *supra*, at p. 716. The problem before us is



## 6 TIMES FILM CORP. v. CITY OF CHICAGO.

not whether the city may forbid the exhibition of a motion picture, which, by its very showing, might in some way "inflict injury or tend to incite an immediate breach of the peace." See *Chaplinsky v. New Hampshire*, 315 U. S. 568, 572.

Let it be completely clear what the Court's decision does. It gives official license to the censor, approving a grant of power to city officials to prevent the showing of any moving picture these officials deem unworthy of a license. It thus gives formal sanction to censorship in its purest and most far-reaching form,<sup>2</sup> to a classical plan of licensing that, in our country, most closely approaches the English licensing laws of the seventeenth century which were commonly used to suppress dissent in the mother country and in the colonies. Emerson, *The Doctrine of Prior Restraint*, 20 *Law & Contemp. Prob.*, 648, 667. The Court treats motion pictures, food for the mind, held to be within the shield of the First Amendment, *Joseph Burstyn, Inc., v. Wilson*, 343 U. S. 495, little differently than it would treat edibles. See *Smith v. California*, 361 U. S. 147, 152.<sup>3</sup> Only a few days ago, the Court, speaking

<sup>2</sup> Professor Thomas I. Emerson, has stated:

"There is, at present, no common understanding as to what constitutes 'prior restraint.' The term is used loosely to embrace a variety of different situations. Upon analysis, certain broad categories seem to be discernible:

"The clearest form of prior restraint arises in those situations where the government limitation, expressed in statute, regulation, or otherwise, undertakes to prevent future publication or other communication without advance approval of an executive official." Emerson, *The Doctrine of Prior Restraint*, 20 *Law & Contemp. Prob.*, 648, 655.

See also *Brattle Films, Inc., v. Commissioner of Public Safety*, 333 Mass. 58, 127 N. E. 2d 891.

<sup>3</sup> In *Smith*, we pointed out that although a "strict liability penal statute" which does not require scienter may be valid when applied to the distributors of food or drugs, it is invalid when applied to booksellers, distributors of ideas. *Id.* at 152-153.



TIMES FILM CORP. v. CITY OF CHICAGO. 7

through MR. JUSTICE STEWART, noted in *Shelton v. Tucker*, — U. S. —:

"In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Id.*, at —.

Here, the Court ignores this considered principle and indiscriminately casts the net of control too broadly. See *Niemotko v. Maryland*, *supra*, at p. 282 (concurring opinion). By its decision, the Court gives its assent to unlimited censorship of moving pictures through a licensing system, despite the fact that Chicago has chosen this most objectionable course to attain its goals without any apparent attempt to devise other means so as not to intrude on the constitutionally protected liberties of speech and press.

Perhaps the most striking demonstration of how far the Court departs from its holdings in *Near* and subsequent cases may be made by examining the various schemes that it has previously determined to be violative of the First and Fourteenth Amendments' guaranty.

A remarkable parallel to the censorship plan now before the Court, although one less offensive to the First Amendment, is found in the *Near* case itself. The Minnesota statute there under attack did not require that *all* publications need be approved before distribution. That statute only provided that a person may be enjoined by a court from publishing a newspaper which was "malicious, scandalous or defamatory." *Id.*, at 712. The injunction in that case was issued only after *Near* had allegedly published nine such newspapers. The statute permitted issuance of an injunction only on proof that, within the

## 8. TIMES FILM CORP. v. CITY OF CHICAGO.

prior three months, such an offensive newspaper had already been published. Near was not prevented "from operating a newspaper in harmony with the public welfare." *Ibid.* If the state court found that Near's subsequent publication conformed to this standard, Near would not have been held in contempt. But, the Court there found that this system of censorship by a state court, used only after it had already been determined that the publisher had previously violated the standard, had to fall before the First and the Fourteenth Amendments. It would seem that, *a fortiori*, the present system must also fall.

The case of *Grosjean v. American Press Co.*, *supra*, provides another forceful illustration. The Court held there that a license tax of two percent on the gross receipts from advertising of newspapers and periodicals having a circulation of over 20,000 week was a form of prior restraint and therefore invalid. Certainly this would seem much less an infringement on the liberties of speech and press protected by the First and Fourteenth Amendments than the classic system of censorship we now have before us. It was held, in *Grosjean*, that the imposition of the tax would curtail the amount of revenue realized from advertising and therefore operate as a restraint on publication. The license tax in *Grosjean* is analogous to the license fee in the case at bar, a fee to which petitioner raises no objection. It was also held, in *Grosjean*, that the tax had a "direct tendency to restrict circulation," *id.*, at 244-245 (emphasis added), because it was imposed only on publications with a weekly circulation of 20,000 or more; that "if it were increased to a high degree . . . it might well result in destroying both advertising and circulation." *Id.*, at 245. (Emphasis added.) These were the evils calling for reversal in *Grosjean*. I should think that these evils are of minor import in com-

parison to the evils consequent to the licensing system which the Court here approves.

In *Hague v. C. I. O.*, 307 U. S. 496, a city ordinance required that a permit be obtained for public parades or public assembly. The permit could "only be refused for the purpose of preventing riots, disturbances or disorderly assemblage." *Id.*, at 502. Mr. Justice Roberts' opinion said of the ordinance:

"It enables the Director of Safety to refuse a permit on his mere opinion that such refusal will prevent 'riots, disturbances or disorderly assemblage.' It can thus, as the record discloses, be made the instrument of arbitrary suppression of free expression of views on national affairs, for the prohibition of all speaking will undoubtedly 'prevent' such eventualities." *Id.*, at 616.

May anything less be said of Chicago's movie censorship plan?

The question before the Court in *Schneider v. State*, *supra*, concerned the constitutional validity of a town ordinance requiring a license for the distribution of circulars. The police chief was permitted to refuse the license if the application for it or further investigation showed "that the canvasser is not of good character or is canvassing for a project not free from fraud. . . ." *Id.*, at 158. The Court said of that ordinance:

"It bans unlicensed communication of any views or the advocacy of any cause from door to door, and permits canvassing only subject to the power of a police officer to determine, as a censor, what literature may be distributed from house to house and who may distribute it. The applicant must submit to that officer's judgment evidence as to his good character and as to the absence of fraud in the 'project'

10 TIMES FILM CORP. v. CITY OF CHICAGO.

he proposes to promote or the literature he intends to distribute, and must undergo a burdensome and inquisitorial examination, including photographing and fingerprinting. In the end, his liberty to communicate with the residents of the town at their homes depends upon the exercise of the officer's discretion." *Id.*, at 163-164.

I believe that the licensing plan at bar is fatally defective because of this precise objection.

A study of the opinion in *Cantwell v. Connecticut*, *supra*, further reveals the Court's sharp divergence today from seriously deliberated precedent. The statute in *Cantwell* forbade solicitation for any alleged religious, charitable or philanthropic cause unless the secretary of the public welfare council determined that the "cause [was] a religious one or [was] a bona fide object of charity or philanthropy and conform[ed] to reasonable standards of efficiency and integrity. . . ." *Id.*, at 302. Speaking of the secretary of the public welfare council, the Court held:

"If he finds that the cause is not that of religion, to solicit for it becomes a crime. He is not to issue a certificate as a matter of course. His decision to issue or refuse it involves appraisal of facts, the exercise of judgment, and the formation of an opinion. He is authorized to withhold his approval if he determines that the cause is not a religious one. Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth." *Id.*, at 305.

Does the Court today wish to distinguish between the protection accorded to religion by the First and Fourteenth Amendments and the protection accorded to

speech by those same provisions? I cannot perceive the distinction between this case and *Cantwell*. Chicago says that it faces a problem—obscene and incendiary films. Connecticut faced the problem of fraudulent solicitation. Constitutionally, is there a difference? See also *Largent v. Texas*, 318 U. S. 418.

In *Thomas v. Collins*, 323 U. S. 516, this Court held that a state statute requiring a labor union organizer to obtain an organizer's card was incompatible with the free speech and free assembly mandates of the First and Fourteenth Amendments. The statute demanded nothing more than that the labor union organizer register, stating his name, his union affiliations and describing his credentials. This information having been filed, the issuance of the organizer's card was subject to no further conditions. The State's obvious interest in acquiring this pertinent information was felt not to constitute an exceptional circumstance to justify the restraint imposed by the statute. It seems clear to me that the Chicago ordinance in this case presents a greater danger of stifling speech.

The two sound truck cases are further poignant examples of what had been this Court's steadfast adherence to the opposition of previous restraints on First Amendment liberties. In *Saia v. New York*, 334 U. S. 558, it was held that a city ordinance which forbade the use of sound amplification devices in public places without the permission of the Chief of Police was unconstitutional on its face since it imposed a previous restraint on public speech. Two years later, the Court upheld a different city's ordinance making unlawful the use of "any instrument of any kind or character which emits herefrom loud and raucous noises and is attached to and upon any vehicle operated or starting upon . . . streets or public places. . . ." *Kovacs v. Cooper*, 336 U. S. 77, 78. One of the grounds by which the opinion of Mr. Justice Reed distinguished *Saia* was that the

12 TIMES FILM CORP. v. CITY OF CHICAGO.

*Kovacs* ordinance imposed no previous restraint. *Id.*, at 82. Mr. Justice Jackson chose to differentiate sound trucks from the "moving picture screen, the radio, the newspaper, the handbill . . . and the street corner orator. . . ." *Id.*, at 97 (concurring opinion). (Emphasis added.) He further stated that "no violation of the Due Process Clause of the Fourteenth Amendment by reason of infringement of free speech arises unless such regulation or prohibition undertakes to censor the contents of the broadcasting." *Ibid.* Needless to repeat, this is the violation the Court sanctions today.

Another extremely similar, but again less objectionable, situation was brought to the Court in *Kunz v. New York*, 340 U. S. 290. There, a city ordinance proscribed the right of citizens to speak on religious matters in the city streets without an annual permit. Kunz had previously had his permit revoked because "he had ridiculed and denounced other religious beliefs in his meetings." *Id.*, at 292.<sup>4</sup> Kunz was arrested for subsequently speaking in the city streets without a permit. The Court reversed Kunz' conviction holding:

"We have here, then an ordinance which gives an administrative official discretionary power to control in advance the right of citizens to speak on religious matters on the streets of New York. As such, the ordinance is clearly invalid as a prior restraint on the exercise of First Amendment rights." *Id.*, at 293.

The Chicago censorship and licensing plan is effectively no different. The only meaningful distinction between *Kunz* and the case at bar appears to be in the disposition of them by the Court.

The ordinance before us in *Staub v. City of Baxley*, 355 U. S. 313, made unlawful the solicitation, without a

<sup>4</sup> For the particularly provocative statements made by Kunz, see the dissent of Mr. Justice Jackson. *Id.*, at 296-297.



permit, of members for an organization which requires the payment of membership dues. The ordinance stated that "in passing upon such application the Mayor and Council shall consider the character of the applicant, the nature of the business of the organization for which members are desired to be solicited, and its effects upon the general welfare of citizens of the City of Baxley." *Id.*, at 315. MR. JUSTICE WHITTAKER, speaking for the Court, stated "that the ordinance is invalid on its face because it makes enjoyment of the constitutionally guaranteed freedom of speech contingent upon the will of the Mayor and Council of the City and thereby constitutes a prior restraint upon, and abridges, that freedom." *Id.*, at 321. In *Staub*, the ordinance required a permit for solicitation; in the case decided today, the ordinance requires a permit for the exhibition of movies. If this is a valid distinction, it has not been so revealed. In *Staub*, the permit was to be granted on the basis of certain indefinite standards; in the case decided today, nothing different may be said.

As the Court recalls, in *Joseph Burstyn, Inc., v. Wilson*, 343 U. S. 495, 502, it was held that motion pictures come "within the free speech and free press guaranty of the First and Fourteenth Amendments." Although the Court found it unnecessary to decide "whether a state may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene films," *id.*, at 506, MR. JUSTICE CLARK stated, in the Court's opinion, quite accurately:

"But the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule. There is no justification in this case for making an exception to that rule.

"The statute involved here does not seek to punish, as a past offense, speech or writing falling within



14. TIMES FILM CORP. v. CITY OF CHICAGO.

the permissible scope of subsequent punishment. On the contrary, New York requires that permission to communicate ideas be obtained in advance from state officials who judge the content of the words and picture sought to be communicated. This Court recognized many years ago that such a previous restraint is a form of infringement upon freedom of expression to be especially condemned. *Near v. Minnesota, ex rel Olson*, 283 U. S. 697 (1931). The Court there recounted the history which indicates that a major purpose of the First Amendment guaranty of a free press was to prevent prior restraints upon publication, although it was carefully pointed out that the liberty of the press is not limited to that protection. It was further stated that 'the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases.' *Id.*, at 716. In the light of the First Amendment's history and of the *Near* decision, the State has a heavy burden to demonstrate that the limitation challenged here presents such an exceptional case." *Id.*, at 503-504.

Here, once more, the Court recognized that the First Amendment's rejection of prior censorship through licensing and previous restraint is an inherent and basic principle of freedom of speech and the press. Now, the Court strays from that principle; it strikes down that tenet without requiring any demonstration that this is an "exceptional case," whatever that might be, and without any indication that Chicago has sustained the "heavy burden" which was supposed to have been placed upon it. Clearly, this is neither an exceptional case nor has Chicago sustained any burden.

Perhaps today's surrender was forecast by *Kingsley Books, Inc., v. Brown*, *supra*. But, that was obviously

not this case, and accepting *arguendo* the correctness of that decision, I believe that it leads to a result contrary to that reached today. The statute in *Kingsley* authorized "the chief executive, or legal officer, of a municipality to invoke a 'limited injunctive remedy', under closely defined procedural safeguards, against the sale and distribution of written and printed matter found after due trial [by a court] to be obscene. . . ." *Id.*, at 437. The Chicago scheme has no procedural safeguards; there is no trial of the issue before the blanket injunction against exhibition becomes effective. In *Kingsley*, the grounds for the restraint were that the written or printed matter was "obscene, lewd, lascivious, filthy, indecent, or disgusting . . . or immoral. . . ." *Id.*, at 438. The Chicago objective is to capture much more. The *Kingsley* statute required the existence of some cause to believe that the publication was obscene before the publication was put on trial. The Chicago ordinance requires no such showing.

The booklets enjoined from distribution in *Kingsley* were concededly obscene.<sup>5</sup> There is no indication that this is true of the moving picture here. This was treated as a particularly crucial distinction. Thus, the Court has suggested that, in times of national emergency, the Government might impose a prior restraint upon "the publication of the sailing dates of transports or the number and

<sup>5</sup> Judge Stanley H. Fuld rightly observed:

"Whatever might be said of a scheme of advance censorship directed against all *possibly* obscene writings, the case before us concerns a regulatory measure of far narrower impact, of a kind neither entailing the grave dangers of general censorship nor productive of the abuses which gave rise to the constitutional guarantees. (Cf. Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 Harv. L. Rev. 640, 650-51.) *Brown v. Kingsley Books, Inc.*, 1 N. Y. 2d 177, 185, 134 N. E. 2d 461, 465.

location of troops." *Near v. Minnesota, supra*, p. 716; cf. *Ex parte Milligan*, 71 U. S. 2. But, surely this is not to suggest that the Government might require that all new papers be submitted to a censor in order to assist it in preventing such information from reaching print. Yet in this case the Court gives its blessing to the censorship of all motion pictures in order to prevent the exhibition of those it feels to be constitutionally unprotected.

The statute in *Kingsley* specified that the person sought to be enjoined was to be entitled to a trial of the issues within one day after joinder and a decision was to be rendered by the court within two days of the conclusion of the trial. The Chicago plan makes no provision for prompt judicial determination. In *Kingsley*, the person enjoined had available the defense that the written or printed matter was not obscene if an attempt was made to punish him for disobedience of the injunction. The Chicago ordinance admits no defense in a prosecution for failure to procure a license other than that the motion picture was submitted to the censor and a license was obtained.

Finally, the Court in *Kingsley* painstakingly attempted to establish that that statute, in its effective operation, was no more a previous restraint on, or interference with, the liberty of speech and press than a statute imposing criminal punishment for the publication of pornography. In each situation, it contended, the publication may have passed into the hands of the public. Of course, this argument is inadmissible in this case and the Court does not purport to advance it.

It would seem idle to suppose that the Court today is unaware of the evils of the censor's basic authority, of the mischief of the system against which so many great men have waged stubborn and often precarious warfare for centuries, see *Grosjean v. American Press Co., supra*, at p. 247, of the scheme that impedes all communication by

hanging threateningly over creative thought.\* But the Court dismisses all of this simply by opining that "the phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test." — U. S. —. I must insist that "a pragmatic assessment of its operation." *Kingsley Books, Inc., v. Brown, supra*, at p. 442, lucidly portrays that the system that the Court sanctions today is inherently bad. One need not disagree with the Court that Chicago has chosen the most effective means of suppressing obscenity. Censorship has been so recognized for centuries. But, this is not to say that the Chicago plan, the old, abhorrent English system of censorship through licensing, is a permissible form of prohibiting unprotected speech. The inquiry, as stated by the Court but never resolved, is whether this form of prohibition results in "unreasonable strictures on individual liberty." — U. S. —; whether licensing, as a prerequisite to exhibition, is barred by the First and Fourteenth Amendments.

A most distinguished antagonist of censorship, in "a plea for uncensored printing," has said:

"If he [the censor] be of such worth as behooves him, there cannot be a more tedious and displeasing

\* Tolstoy once wrote:

"You would not believe how, from the very commencement of my activity, that horrible Censor question has tormented me! I wanted to write what I felt; but all the same time it occurred to me that what I wrote would not be permitted, and involuntarily I had to abandon the work. I abandoned, and went on abandoning, and meanwhile the years passed away." Quoted by Chafee, *supra*, at p. 241.

In *Smith v. California, supra*, we noted that "our decisions furnish examples of legal devices and doctrines, in most applications consistent with the Constitution, which cannot be applied in settings where they have the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it." *Id.*, at 150-151. See *Shelton v. Tucker, supra*. Forty-six of our States currently see fit to rely on traditional criminal punishment for the protection of their citizens.

## 18 TIMES FILM CORP. v. CITY OF CHICAGO

Journey-work, a greater loss of time levied upon his head; then to be made the perpetuall reader of unchosen books and pamphlets . . . we may easily forsee what kind of licensers we are to expect hereafter, either ignorant, imperious, and remisse or basely pecuniary." Areopagitica, in the Complete Poetry and Selected Prose of John Milton (Modern Library Ed. 1950), 677, at 700.

There is no sign that Milton's fear of the censor would be dispelled in twentieth century America. The censor is beholden to those who sponsored the creation of his office, to those who are most radically preoccupied with the suppression of communication. The censor's function is to restrict and to restrain; his decisions are insulated from the pressures that might be brought to bear by public sentiment if the public were given an opportunity to see that which the censor has curbed.

The censor performs free from all of the procedural safeguards afforded litigants in a court of law. See *Kingsley Books, Inc., v. Brown*, *supra*, at p. 437; cf. *Near v. Minnesota*, *supra*, at p. 713; *Cantwell v. Connecticut*, *supra*, at p. 306. The likelihood of a fair and impartial trial disappears when the censor is both prosecutor and judge. There is a complete absence of rules of evidence; the fact is that there is usually no evidence at all as the system at bar vividly illustrates.\* How different from a

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\* Although the Chicago ordinance designates the Commissioner of Police as the censor, counsel for the city explained that the task is delegated to a group of people, often women: "The procedure before Chicago's censor board was found to be as follows according to the testimony of the 'commanding officer of the censor unit':

"Q. Am I to understand that the procedure is that only these six people are in the room, and perhaps you, at the time the film is shown?

"A. Yes.

[Footnote 8 continued on p. 19.]

TIMES FILM CORP. v. CITY OF CHICAGO. 19

judicial proceeding where a full case is presented by the litigants. The inexistence of a jury to determine contemporary community standards is a vital flaw." See *Kingsley Books, Inc., v. Brown, supra*, at pp. 447-448 (dissenting opinion).

A revelation of the extent to which censorship has recently been used in this country is indeed astonishing. The Chicago licensors have banned newsreel films of Chicago policemen shooting at labor pickets and have ordered the deletion of a scene depicting the birth of a buffalo in Walt Disney's *Vanishing Prairie*. Gavzer, Who Censors

"Q. Does the distributor ever get a chance to present his views on the picture?

"A. No, sir.

"Q. Are other people's views invited, such as drama critics or movie reviewers or writers or artists of some kind; or are they ever asked to comment on the film before the censor board makes its decision?

"A. No, sir.

"Q. In other words, it is these six people plus yourself in a relationship that we have not as yet defined who decide whether the picture conforms to the standards set up in the ordinance?

"A. Yes, sir." Transcript of Record, p. 51, *Times Film Corp. v. City of Chicago*, 244 F. 2d 432.

\* Cf. Chafee, *supra*:

"A jury is none too well fitted to pass on the injurious nature of opinions, but at least it consists of twelve men who represent the general views and the common sense of the community and often appreciate the motives of the speaker or writer whose punishment is sought. A censor, on the contrary, is a single individual with a professionalized and partisan point of view. His interest lies in perpetuating the power of the group which employs him, and any bitter criticism of the group smacks to him of incitement to bloody revolution." *Id.*, at 314.

"On the other hand, a mayor and a police commissioner are not ordinarily selected on the basis of wide reading and literary judgment. They have other duties, which require other qualities. They may lack the training of the permanent censor, and yet run the same risk of being arbitrary and bureaucratic." *Id.*, at 533.



20 TIMES FILM CORP. v. CITY OF CHICAGO.

Our Movies?, Chicago Magazine, Feb. 1956, pp. 35, 39. Before World War II, the Chicago censor denied licenses to a number of films portraying and criticizing life in Nazi Germany including the March of Time's *Inside Nazi Germany*. Editorials, Chicago Daily Times, Jan. 20, Nov. 18, 1938. Recently, Chicago refused to issue a permit for the exhibition of the motion picture *Anatomy of a Murder* based upon the best-selling novel of the same title, because it found the use of words "rape" and "contraceptive" to be objectionable. *Columbia Pictures Corp. v. City of Chicago* (D. C. N. D. Ill.), 59 C. 1058 (1959) (unreported). The Chicago censor bureau excised a scene in *Street With No Name* in which a girl was slapped because this was thought to be a "too violent" episode. Life, Oct. 25, 1948, p. 60. *It Happened in Europe* was severely cut by the Ohio censors who deleted scenes of war orphans resorting to violence. The moral theme of the picture was that such children could even then be saved by love, affection and satisfaction of their basic needs for food. Levy, The Case Against Film Censorship, Films in Review, Apr. 1950, p. 40 (published by Nat. Bd. of Review). The Memphis censors banned *The Southerner* which dealt with poverty among tenant farmers because "it reflects on the south." *Brewster's Millions*, an innocuous comedy of fifty years ago, was recently forbidden in Memphis because the radio and film character Rochester, a Negro, was deemed "too familiar." See Velio, You Can't See That Movie: Censorship in Action, Collier's, May 6, 1950, pp. 11, 66. Maryland censors restricted a Polish documentary film on the basis that it failed to present a true picture of modern Poland. Levy, Case Against Motion Picture Censorship, Film in Review, Apr. 1950, p. 41 (published by Nat. Bd. of Review). *No Way Out*, the story of a Negro doctor's struggle against race prejudice, was banned by the Chicago censor on the ground that "there's a possibility



it could cause trouble." The principal objection to the film was that the conclusion showed no reconciliation between blacks and whites. The ban was lifted after a storm of protest and later deletion of a scene showing Negroes and whites arming for a gang fight. N. Y. Times, Aug. 24, 1950, p. 31, col. 3; Aug. 31, 1950, p. 20, col. 8. Memphis banned *Curley* because it contained scenes of white and Negro children in school together. Kupferman and O'Brien, Motion Picture Censorship—The Memphis Blues, 36 Cornell L. J. 273, 276-278. Atlanta barred *Lost Boundaries*, the story of a Negro physician and his family who "passed" for white, on the ground that the exhibition of said picture "will adversely affect the peace, morals and good order" in the city. N. Y. Times, Feb. 5, 1950, § 2, p. 5, col. 7. See generally Kupferman and O'Brien, *supra*; Note, 60 Yale L. J. 696 *et seq.*; Brief for American Civil Liberties Union as *amicus curiae*, pp. 14-15. *Witchcraft*, a study of superstition through the ages, was suppressed for years because it depicted the devil as a genial rake with amorous leanings, and because it was feared that certain historical scenes, portraying the excesses of religious fanatics, might offend religion. *Scarface*, thought by some as the best of the gangster films, was held up for months; then it was so badly mutilated that retakes costing a hundred thousand dollars were required to preserve continuity. The New York censors banned *Damaged Lives*, a film dealing with venereal disease, although it treated a difficult theme with dignity and had the sponsorship of the American Social Hygiene Society. The picture of Lenin's tomb bearing the inscription "Religion is the opiate of the people" was excised from *Potemkin*. From *Joan of Arc* the Maryland board eliminated Joan's exclamation as she stood at the stake: "Oh, God, why hast thou forsaken me?" and from *Idiot's Delight*, the sentence: "We, the workers of the world, will take care of that." *Professor Mamlock* was produced in Russia and

22. TIMES FILM CORP. v. CITY OF CHICAGO.

portrayed the persecution of the Jews by Nazis. The Ohio censors condemned it as "harmful" and calculated to "stir up hatred and ill will and gain nothing." It was released only after substantial deletions were made. The police refused to permit its showing in Providence, Rhode Island, on the ground that it was communistic propaganda. *Millions of Us*, a strong union propaganda film, encountered trouble in a number of jurisdictions. *Spanish Earth*, a pro-Loyalist documentary picture, was banned by the board in Pennsylvania. Ernst and Lindey, *The Censor Marches On* 96-97, 102-103, 108-111. During the year ending June 30, 1938, the New York board censored, in one way or another, over five percent of the moving pictures it reviewed. *Id.*, at 81. Charlie Chaplin's satire on Hitler, *The Great Dictator*, was banned in Chicago, apparently out of deference to its large German population. Chafee, *supra*, at p. 541. Ohio and Kansas banned newsreels considered pro labor. Kansas ordered a speech by Senator Wheeler opposing the bill for enlarging the Supreme Court to be cut from the *March of Time* as "partisan and biased." *Id.*, at 542. An early version of *Carmen* was condemned on several different grounds. The Ohio censor objected because cigarette-girls smoked cigarettes in public. The Pennsylvania censor disapproved the duration of a kiss. *Id.*, at 543. The New York censors forbade the discussion in films of pregnancy, venereal disease, eugenics, birth control, abortion, illegitimacy, prostitution, miscegenation and divorce. Ernst and Lindey, *supra*, at p. 83. A member of the Chicago censor board explained that she rejected a film because "it was immoral, corrupt, indecent, against my . . . religious principles." Transcript of Record, p. 172. *Times Film Corp. v. City of Chicago*, 244 F. 2d 432. A police sergeant attached to the censor board explained, "Coarse language or anything that would be derogatory to the government—propaganda" is ruled out of foreign films. "Nothing pink

or red is allowed," he added. *Chicago Daily News*, Apr. 7, 1959, p. 3, cols. 7-8. The police sergeant in charge of the censor unit has said: "Children should be allowed to see any movie that plays in Chicago. If a picture is objectionable for a child, it is objectionable period." *Chicago Tribune*, May 24, 1959, p. 8, col. 3. And this is but a smattering produced from limited research. Perhaps the most powerful indictment of Chicago's licensing device is found in the fact that between the Court's decision in 1952 in *Joseph Burstyn, Inc., v. Wilson*, *supra*, and the filing of the petition for certiorari in 1960 in the present case, not once have the state courts upheld the censor when the exhibitor elected to appeal. Brief for American Civil Liberties Union as *amicus curiae*, pp. 13-14.

This is the regimen to which the Court holds that all films must be submitted. It officially unleashes the censor and permits him to roam at will, limited only by an ordinance which contains some standards that, although concededly not before us in this case, are patently imprecise. The Chicago ordinance commands the censor to reject films that are "immoral," see *Commercial Pictures Corp. v. Regents*, 346 U. S. 587; *Kingsley International Pictures Corp. v. Regents*, 360 U. S. 684; or those that portray "depravity, criminality, or lack of virtue of a class of citizens of any race, color, creed, or religion and exposes them to contempt, derision, or obloquy, or tends to produce a breach of the peace or riots, or purports to represent any hanging, lynching, or burning of a human being." May it not be said that almost every censored motion picture that was cited above could also be rejected, under the ordinance, by the Chicago censors. It does not require an active imagination to conceive of the quantum of ideas that will surely be suppressed.

If the censor denies rights protected by the First and Fourteenth Amendments, the courts might be called upon to correct the abuse if the exhibitor decides to pursue

## 24 TIMES FILM CORP. v. CITY OF CHICAGO.

judicial remedies. But, this is not a satisfactory answer as emphasized by this very case. The delays in adjudication may well result in irreparable damage, both to the litigants and to the public. Vindication by the courts of *The Miracle* was not had until five years after the Chicago censor refused to license it. And then the picture was never shown in Chicago. Brief for Petitioner, p. 17. The instant litigation has now consumed almost three years. This is the delay occasioned by the censor; this is the injury done to the free communication of ideas. This damage is not inflicted by the ordinary criminal penalties. The threat of these penalties, intelligently applied, will ordinarily be sufficient to deter the exhibition of obscenity. However, if the exhibitor believes that his film is constitutionally protected, he will show the film, and, if prosecuted under criminal statute, will have ready that defense. The perniciousness of a system of censorship is that the exhibitor's belief that his film is constitutionally protected is irrelevant. Once the censor has made his estimation that the film is "bad" and has refused to issue a permit, there is ordinarily no defense to a prosecution<sup>10</sup> for showing the film without a license.<sup>11</sup> Thus, the film is not shown, perhaps not for years and sometimes not ever. Simply a talismanic test or self-wielding sword? I think not.

<sup>10</sup> That portion of the Chicago ordinance dealing with penalties is as follows:

"Any person exhibiting any pictures or series of pictures without a permit having been obtained therefor shall be fined not less than fifty dollars nor more than one hundred dollars for each offense. A separate and distinct offense shall be regarded as having been committed for each day's exhibition of each picture or series of pictures without a permit."

<sup>11</sup> Professor Paul A. Freund has affirmed that this situation "does indeed have a chilling effect (on freedom of communication) beyond that of a criminal statute." Freund, *The Supreme Court and Civil Liberties*, 4 Vand. L. Rev. 533, 539.

Moreover, more likely than not, the exhibitor will not pursue judicial remedies. See *Schneider v. State*, *supra*, at p. 164; Ernst and Lindey, *supra*, at p. 80. His inclination may well be simply to capitulate rather than initiate a lengthy and costly litigation.<sup>12</sup> In such case, the liberty of speech and press and the public, which benefits from the shielding of that liberty, are in effect, at the mercy of the censor's whim. This powerful tendency to restrict the free dissemination of ideas calls for reversal. See *Grosjean v. American Press Co.*, *supra*, at 245.

Freedom of speech and freedom of the press are further endangered by this "most effective" means for confinement of ideas. It is axiomatic that the stroke of the censor's pen or the cut of his scissors will be a less contemplated decision than will be the prosecutor's determination to prepare a criminal indictment. The standards of proof, the judicial safeguards afforded a criminal defendant and the consequences of bringing such charges will all provoke the mature deliberation of the prosecutor. None of these hinder the quick judgment of the censor, the speedy determination to suppress. Finally, the fear of the censor by the composer of ideas acts as a substantial deterrent to the creation of new thoughts. See Tolstoy's declaration, note 5, *supra*. This is especially true of motion pictures due to the large financial burden that

<sup>12</sup> A particularly frightening illustration is found in the operation of a Detroit book censorship plan. One publisher simply submitted his unprinted manuscripts to the censor and deleted everything "objectionable" before publication. From 1950 to 1952, more than 100 titles of books were disapproved by the censor board. Every book banned was withheld from circulation. The censor board, in addition to finding books "objectionable," listed a group of books not suitable for criminal prosecution as "partially objectionable." Most booksellers were also afraid to handle these. Lockhart and McGuire, *Literature, The Law of Obscenity, and the Constitution*, 38 Minn. L. Rev. 295, 314-316.

must be assumed by their producers. The censor's sword pierces deeply into the heart of free expression.

It seems to me that the Court's opinion comes perilously close to holding that not only may motion pictures be censored but that a licensing scheme may also be applied to newspapers, books and periodicals, radio, television, public speeches, and every other medium of expression. The Court suggests that its decision today is limited to motion pictures by asserting that they are "not necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems." — U. S.

But, this, I believe, is the invocation of a talismanic phrase. The Court, in no way, explains why moving pictures should be treated differently than any other form of expression, why moving pictures should be denied the protection against censorship—"a form of infringement upon freedom of expression to be *especially* condemned." *Joseph Burstyn, Inc., v. Wilson, supra*, at p. 503. (Emphasis added.) When pressed during oral argument, counsel for the city could make no meaningful distinction between the censorship of newspapers and motion pictures. In fact, the percentage of motion pictures dealing with social and political issues is steadily rising.<sup>13</sup> The Chicago ordinance makes no exception for newsreels, documentaries, instructional and educational films or the like. All must undergo the censor's inquisition. Nor may it be suggested that motion pictures may be treated differently from newspapers because many movies are produced essentially for purposes of entertainment. As the Court said in *Winters v. New York*, 333 U. S. 507:

"We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the

<sup>13</sup> See Note, 60 Yale L. J. 696, 706, n. 25.



informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine."

*Id.*, at 510. See *Thomas v. Collins*, *supra*, at p. 531.<sup>14</sup>

The contention may be advanced that the impact of motion pictures is such that a licensing system of prior censorship is permissible. There are several answers to this, the first of which I think is the Constitution itself. Although it is an open question whether the impact of motion pictures is greater or less than that of other media, there is not much doubt that the exposure of television far exceeds that of the motion picture. See S. Rep. No. 1466, 84th Cong., 2d Sess. 5. But, even if the impact of the motion picture is greater than that of some other media, that fact constitutes no basis for the argument that motion pictures should be subject to greater suppression. This is the traditional argument made in the censor's behalf; this is the argument advanced against newspapers at the time of the invention of the printing press. The argument was ultimately rejected in England, and has consistently been held to be contrary to our Constitution. No compelling reason has been predicated for accepting the contention now.

It is true that "each method [of expression] tends to present its own peculiar problems." *Joseph Burstyn, Inc., v. Wilson*, *supra*, at p. 503. The Court has addressed itself on several occasions to these problems. In *Schneider v. State*, *supra*, at pp. 160-161, the Court stated, in reference to speaking in public, that "a person

<sup>14</sup> "The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens." 2 Cooley, Const. Lim. (8th ed.), p. 886.



could not exercise this liberty by taking his stand in the middle of a crowded street, contrary to traffic regulations, and maintain his position to the stoppage of all traffic; a group of distributors could not insist upon a constitutional right to form a cordon across the street and to allow no pedestrian to pass who did not accept a tendered leaflet; nor does the guarantee of freedom of speech or of the press deprive a municipality of power to enact regulations against throwing literature broadcast in the streets." The Court recognized that sound trucks call for particularized consideration when it said in *Saia v. New York*, *supra*, at p. 562, "Noise can be regulated by regulating decibels. The hours and place of public discussion can be controlled. . . . Any abuses which loud-speakers create can be controlled by narrowly drawn statutes." But, the Court's decision today does not follow from this. Our prior decisions do not deal with the *content* of the speech; they deal only with the conditions surrounding its delivery. *These* conditions "tend to present the problems peculiar to each method of expression." Here the Court uses this magical phrase to cripple a basic principle of the Constitution.

The Court, not the petitioner, makes the "broadside attack." I would reverse the decision below.

# SUPREME COURT OF THE UNITED STATES

No. 34.—OCTOBER TERM, 1960.

Times Film Corporation,	}	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.
Petitioner,		
v.		
City of Chicago, et al.		

[January 23, 1961.]

MR. JUSTICE DOUGLAS, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACK concur, dissenting.

My view that censorship of movies is unconstitutional because it is a prior restraint and violative of the First Amendment has been expressed on prior occasions. *Superior Films v. Department of Education*, 346 U. S. 587, 588–589 (concurring opinion); *Kingsley Pictures Corp. v. Regents*, 360 U. S. 684, 697 (concurring opinion).

While the problem of movie censorship is relatively new, the censorship device is an ancient one. It was recently stated, "There is a law of action and reaction in the decline and resurgence of censorship and control. Whenever liberty is in the ascendant, a social group will begin to resist it; and when the reverse is true, a similar resistance in favor of liberty will occur." Haney, *Comstockery in America* (1960), pp. 11–12.

Whether or not that statement of history is accurate, censorship has had many champions throughout time.

Socrates: "And shall we just carelessly allow children to hear any casual tales which may be devised by casual persons, and to receive into their minds ideas for the most part the very opposite of those which we should wish them to have when they are grown up?"

Glaucon: "We cannot."

Socrates: "Then the first thing will be to establish a censorship of the writers of fiction, and let the censors receive

## 2 TIMES FILM CORP. v. CITY OF CHICAGO.

any tale of fiction which is good, and reject the bad; and we will desire mothers and nurses to tell their children the authorised ones only. Let them fashion the mind with such tales, even more fondly than they mould the body with their hands; but most of those which are now in use must be discarded." Plato, Republic, Bk. II.

Hobbes was the censor's proponent: "... it is annexed to the sovereignty, to be judge of what opinions and doctrines are averse, and what conducing to peace; and consequently, on what occasions, how far, and what men are to be trusted withal, in speaking to multitudes of people; and who shall examine the doctrines of all books before they be published. For the actions of men proceed from their opinions; and in the well-governing of opinions, consisteth the well-governing of men's actions, in order to their peace, and concord." Leviathan, (Oakeshott ed. 1947), p. 116.

Regimes of censorship are common in the world today. Every dictator has one; every Communist regime finds it indispensable.<sup>1</sup> One shield against world opinion that colonial powers have used was the censor, as dramatized by France in North Africa. Even England has a vestige of censorship in the Lord Chamberlain (32 Halsbury's L. (2d ed. 1939), p. 68) who presides over the stage—a system that in origin was concerned with the barbs of political satire.<sup>2</sup> But the concern with political satire

<sup>1</sup> "Nowhere have the Communists become simply a vote-getting party. They are organized around ideas and they care about ideas. They are the great heresy hunters of the modern world." Ways, Beyond Survival (1959), p. 199.

<sup>2</sup> Ivor Brown in a recent summary of the work of the Lord Chamberlain states: "The licensing of plays was imposed not to protect the morals of the British public but to safeguard the reputation of politicians. This happened in 1737 when the Prime Minister, Sir Robert Walpole, infuriated by the stage lampoons of Henry Fielding and others, determined to silence these much enjoyed exposures of his alleged corruption and incompetence. This had the curiously beneficial result of driving Fielding away from the stage. He then

shifted to a concern with atheism and with sexual morality—the last being the concern evident in Chicago's system now before us.

The problems of the wayward mind concern the clerics, the psychiatrists, and the philosophers. Few groups have hesitated to create the political pressures that translate into secular law their notions of morality. Pfeffer, *Creeds In Competition* (1958), pp. 103–109. No more powerful weapon for sectarian control can be imagined than governmental censorship. Yet in this country the state is not the secular arm of any religious school of thought, as in some nations; nor is the church an instrument of the state. Whether—as here—city officials or—as in Russia—a political party lays claim to the power of governmental censorship, whether the pressures are for a conformist moral code or for a conformist political ideology, no such regime is permitted by the First Amendment.

The forces that build up demands for censorship are heterogeneous.

“The comstocks are not merely people with intellectual theories who might be convinced by more persuasive theories; nor are they pragmatists who will be guided by the balance of power among pressure groups. Many of them are so emotionally involved in the condemnation of what they find objectionable

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became an excellent magistrate and a major creator of the English novel. But in the puritanical atmosphere of the nineteenth century the discipline was applied to the moral content of plays and applied so rigorously that the dramatists were barred from serious treatment of ‘straight sex,’ as well as the ‘abnormalities.’ The prissiness of respectable Victorian society was such that legs were hardly to be mentioned, let alone seen, and Charles Dickens wrote cumbrously of ‘unmentionables’ when he meant trousers.” *N. Y. Times*, Jan. 1, 1961, § 2, p. X3. And see Knowles, *The Censor, The Drama, and The Film* (1934). As to British censorship of movies see 15 & 16 Geo. 6 & 1 Eliz. 2, c. 68.

#### 4 TIMES FILM CORP. v. CITY OF CHICAGO.

that they find rational arguments irrelevant. They *must* suppress what is offensive in order to stabilize their own tremulous values and consciences. Panic rules them, and they cannot be calmed by discussions of legal rights, literary integrity, or artistic merit." Haney, *op. cit. supra*, pp. 176-177.

Yet as long as the First Amendment survives, the censor, no matter how respectable his cause, cannot have the support of government. It is not for government to pick and choose according to the standards of any religious, political, or philosophical group. It is not permissible, as I read the Constitution, for government to release one movie and refuse to release another because of an official's concept of the prevailing need or the public good. The Court in *Near v. Minnesota*, 283 U. S. 697, 713, said that the "chief purpose" of the First Amendment's guarantee of freedom of press was "to prevent previous restraints upon publication."

A noted Jesuit has recently stated one reason against government censorship:

"The freedom toward which the American people are fundamentally orientated is a freedom under God, a freedom that knows itself to be bound by the imperatives of the moral law. Antecedently it is presumed that a man will make morally and socially responsible use of his freedom of expression; hence there is to be no prior restraint on it. However, if his use of freedom is irresponsible, he is summoned after the fact to responsibility before the judgment of the law. There are indeed other reasons why prior restraint on communications is outlawed; but none are more fundamental than this." Murray, *We Hold These Truths* (1960), pp. 164-165.

Experience shows other evils of "prior restraint." The regime of the censor is deadening. One who writes cannot

afford entanglements with the man whose pencil can keep his production from the market. The result is a pattern of conformity. Milton made the point long ago: "For though a licenser should happen to be judicious more than ordinarily, which will be a great jeopardy of the next succession, yet his very office, and his commission enjoins him to let pass nothing but what is vulgarly received already." *Areopagitica*, 3 Harvard Classics (1909), p. 212.

Another evil of censorship is the ease with which the censor can erode liberty of expression. One stroke of the pen is all that is needed. Under a censor's régime the weights are cast against freedom.<sup>3</sup> If, however, gov-

<sup>3</sup> John Galsworthy wrote in opposition to the British censorship of plays: "In this country the tongue and pen are subject to the law, so may it ever be! But in this country neither tongue nor pen are in any other instance subject to the despotic judgments of a single man. The protest is not aimed at the single man who holds this office. He may be the wisest man in England, the best fitted for his despotic office. It is not he; it is the office that offends. It offends the decent pride and self-respect of an entire profession. To those who are surprised that dramatic authors should take themselves so seriously we say, What workman worthy of his tools does not believe in the honour of his craft? In this appeal for common justice we dramatists, one little branch of the sacred tree of letters, appeal to our brother branches. We appeal to the whole knighthood of the pen—scientists, historians, novelists, journalists. The history of the health of nations is the history of the freedom—not the licence—of the tongue and pen. We are claiming the freedom—not the licence—of our pens. Let those hold back in helping us who would tamely suffer their own pens to be warped and split, as ours are before we take them up." (*London Times*, Nov. 1, 1907, p. 7. And see the testimony of George Bernard Shaw in Report, Joint Select Committee of the House of Lords and the House of Commons on the Stage Plays (Censorship) (1909), p. 46 *et seq.* Shaw, three of whose plays had been suppressed, caused a contemporary sensation by asking, and being refused, permission to file with the Committee an attack on censorship that he had prepared. Shaw's version of the story and the rejected statement can be found as his preface to *The Shewing-Up of Blanco Posnet*. He says in his statement: "Any journalist may



## 6. TIMES FILM CORP. v. CITY OF CHICAGO.

ernment must proceed against an illegal publication in a prosecution, then the advantages are on the other side. All the protections of the Bill of Rights come into play. The presumption of innocence, the right to jury trial, proof of guilt beyond a reasonable doubt—these become barriers in the path of officials who want to impose their standard of morality on the author or producer. The advantage a censor enjoys while working as a supreme bureaucracy disappear. The public trial to which a person is entitled who violates the law gives a hearing on the merits, airs the grievance, and brings the community judgment to bear upon it. If a court sits in review of a censor's ruling, its function is limited. There is leeway left the censor, who like any agency and its *expertise*, is given a presumption of being correct.<sup>4</sup> That advantage disappears when the government must wait until a publication is made and then prove its case in the accepted manner before a jury in a public trial. All of this is anathema to the censor who prefers to work in secret, perhaps because as Milton said, he is "either ignorant, imperious, and remiss, or basely pecuniary." *Areopagitica*, *supra*, p. 210.

publish an article, any demagogue may deliver a speech without giving notice to the government or obtaining its license. The risk of such freedom is great; but as it is the price of our political liberty, we think it worth paying. We may abrogate it in emergencies just as we stop the traffic in a street during a fire or shoot thieves on sight after an earthquake. But when the emergency is past, liberty is restored everywhere except in the theatre. [Censorship is] a permanent proclamation of martial law with a single official substituted for a court martial." *The Shewing-Up of Blanco Posnet* (Brentano's, 1913), p. 36.

<sup>4</sup> See Comment, 71 Harv. L. Rev. 326, 331. Cf. *Glanzman v. Christenberry*, 175 F. Supp. 485, with *Grove Press, Inc., v. Christenberry*, 175 F. Supp. 488, as to the weight given to post office determinations of nonmailability.



The First Amendment was designed to enlarge, not to limit, freedom in literature and in the arts as well as in politics, economics, law, and other fields. *Hannegan v. Esquire, Inc.*, 327 U. S. 146, 151-159; *Kingsley Pictures Corp. v. Regents; supra*. Its aim was to unlock all ideas for argument, debate, and dissemination. No more potent force in defeat of that freedom could be designed than censorship. It is a weapon that no minority or majority group, acting through government, should be allowed to wield over any of us.

"First, within the larger pluralist society each minority group has the right to censor for its own members, if it so chooses, the content of the various media of communication, and to protect them, by means of its own choosing, from materials considered harmful according to its own standards.

"Second, in a pluralist society no minority group has the right to demand that government should impose a general censorship, affecting all the citizenry, upon any medium of communication, with a view to punishing the communication of materials that are judged to be harmful according to the special standards held within one group.

"Third, any minority group has the right to work toward the elevation of standards of public morality in the pluralist society through the use of the methods of persuasion and pacific argument.

"Fourth, in a pluralist society no minority group has the right to impose its own religious or moral views on other groups, through the use of the methods of force, coercion, or violence." Murray, *We Hold These Truths* (1960), p. 168.